Petition

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY BATTISTA,

AND

T. ANTHONY ARNONE

Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

I. Whether the indictment and trial masking multiple conspiracies behind the indictment charging a single conspiracy claiming nationwide distribution of an obscene film, was violative of Petitioners' Due Process rights.
Whether the utilization of a nationwide conspiracy charge effectively eradicates the significance of local contemporary community standards established by the rationale of *Miller v. California*, 413 U.S. 15 (1973).

II. Were the Petitioners denied their constitutional rights to fair Grand Jury proceedings when (1) the Grand Jury never viewed the film they indicted as obscene, and (2) where Petitioners were not permitted to demonstrate a compelling need that outweighs the secrecy policy, normally attend to Grand Jury proceedings.

III. Did the prosecution fail to establish that the film "Deep Throat" was obscene; and was the defense impermissibly restricted in its proof on the issue of obscenity; and was the prosecutor wrongfully permitted to introduce evidence before the jury that in the opinion of one expert called by the government, that the film might be harmful to some people.

IV. Did the Court err in instructing the jury by not charging that contemporary community standards of "tolerance" should be the test as to the average adult as set forth in *Miller v. California*, 413 U.S. 15 (1973) and *Smith v. United States*, 431 U.S. 291 (1977), and as such were Petitioners' rights under the First and Fifth Amendments violated thereby.

V. Were Petitioners' rights to Due Process and First Amendment freedoms violated, where as here, the evidence failed to show that Petitioners were aware of the contents of the film, when the Court refused to charge knowledge of "contents" of the film as relevant to scienter; and where there was a complete absence of any evidence that Petitioners knew that the film "Deep

Throat" was being distributed in the Western District of Tennessee in February of 1974.

VI. Were the jury instructions as to Petitioner Arnone on the legal concept of "withdrawal" from a conspiracy constitutionally inadequate and violative of his Due Process rights, and contrary to this Court's opinion in *United States v. United States Gypsum Co.* 438 U.S. 422.

PARTIES IN THE UNITED STATES COURT OF APPEALS

The parties of the Court below were:

1) The United States of America, Plaintiff;

2) Anthony Battista, Petitioner herein (judgment of conviction affirmed) 646 F.2d 237 (1981)

3) T. Anthony Arnone, Petitioner herein (judgment of conviction affirmed) 646 F.2d 237 (1981)

4) Louis Peraino (judgment of conviction affirmed) 646 F.2d 237 (1981)

5) Bryanston Distributors, Inc. (judgment of conviction affirmed) 646 F.2d 237 (1981)

6) Gerard Damiano Film Productions, Inc. (judgment of conviction affirmed) 646 F.2d 237 (1981)

7) Joseph Peraino (judgment of conviction reversed and indictment dismissed) 645 F.2d 548

8) Plymouth Distributors, Inc. (judgment of conviction reversed and indictment dismissed) 645 F.2d 548

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I. The indictment and trial impermissibly sought to mask multiple conspiracies behind the claim of a national obscenity conspiracy. 10

The effect of such an approach is to eradicate significance of local community standards since, under such a theory, any locality could prosecute the author, producer, and all distributors of an allegedly obscene work. 10

II. The Petitioners were effectively deprived of their constitutional rights to fair Grand Jury proceedings since the Grand Jury never viewed the allegedly obscene film before returning an indictment, and the Petitioners were impermissibly denied the right to demonstrate that the Grand Jury lacked an adequate factual basis upon which to indict. 14,15

III. The government failed to establish that the film "Deep Throat" is obscene; the defense was improperly restricted in its proof on that issue; and the prosecution was wrongfully permitted to introduce evidence that the film might be harmful to some people. 16

IV. The Court's charge to the jury on community standards, refusing, as it did, to incorporate the concept of "tolerance" deemed significant by this Court in *Smith v. United States*, 431 U.S. 291 (1977) violated Petitioners' rights to Due Process under the Fifth Amendment, when dealing with "press materials" within the penumbra of the First Amendment. 20,21

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JOINT PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the Sixth Circuit.

REPORTED OPINIONS DELIVERED IN THE COURTS BELOW

United States v. Battista, et al., 646 F.2d 237(6th Cir., April 6, 1981).

United States v. Joseph Peraino, et al., 645 F.2d 548 (6th Cir., April 24, 1981).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Sixth Circuit in the within case was dated and filed on April 6, 1981.

Anthony Battista and T. Anthony Arnone filed a Petition for Rehearing in the Court of Appeals, and that Petition was denied on June 12, 1981, App. infra.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceable to assembly, and to petition the government for a redress of grievances."

United States Constitution, Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusa-

tion; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

18 U.S. Code, Section 371
Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S. Code, Section 1462
Importation or transportation of obscene matters.

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commence —

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy photograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful —

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. (As amended May 27, 1950, c.214, Section 1, 64 Stat. 194; Aug. 28, 1958, Pub.L. 85-796, Section 2, 72 Stat. 962; Jan. 8, 1971, Pub.L. 91-662, Section 4, 84 Stat. 1973)".

18 U.S. Code Section 1465
Transportation of obscene matters for sale or distribution.

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhousette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

"When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest."

(Added June 28, 1955, c.190, Section 3, 69 Stat. 183).

STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction

This is a Federal criminal prosecution, commenced by the filing of an indictment, on June 13, 1975, by a Grand Jury in the Western District of Tennessee, Western Division. The indictment charged that Petitioners and about one hundred other named people and corporations, as well as "others whose names to the Grand Jury are unknown . . ." engaged in a conspiracy (18 U.S.C. §371) to distribute an obscene motion picture ("Deep Throat") in interstate commerce (18 U.S.C. §1462, 1465), and that the conspiracy commenced on February 26, 1971, and continued to the filing of the indictment. Eighteenpersons and corporations were named as defendants; the others were named as unindicted co-conspirators.

A second count of the indictment charged that the same defendants engaged in a substantive violation of 18 U.S.C. §1465 when the film was transported to the Western District of Tennessee on or about February 20, 1974.

B. Course of Proceedings

The indictment was joined for trial with a subsequent, almost identical indictment against two other individuals. The case has been tried twice, with an intervening appeal to the United States Court of Appeals for the Sixth Circuit.

The first trial commenced on March 1, 1976, with seventeen defendants. The trail concluded on April 30, 1976, with jury verdicts against each of the defenndants as to the conspiracy count, and as against certain of the defendants with respect to the substantive count. Petitioners Louis Peraino and Bryanston Distributors were acquitted as to the substantive count. Petitioner Gerard Damiano Film Productions, Inc., was convicted as to the substantive count.

On appeal, the Court of Appeals reversed the convictions, upon the government's confession of error with respect to a defect in the trial court's instructions to the jury.

The second jury trial commenced on November 13, 1978. The government chose not to pursue prosecution of the substantive offense against any of the defendants, and the second trial was limited to the conspiracy charge against eleven defendants. Seven defendants, including Petitioners, were found guilty, and the jury was unable to agree as to one defendant.

On appeal, the Court of Appeals reversed the convictions of two defendants (Joseph Peraino and Plymouth Distributors, Inc.) and ordered that the indictment be dismissed against them. 645 F.2d 548. The Court affirmed the convictions of each of the remaining defendants. 646 F.2d 237.

Thus, each of the Petitioners stand convicted of conspiracy to violate the aforementioned Federal obscenity statutes. Execution of all sentences has been stayed, pending appeal, and the Court of Appeals has stayed the issuance of its mandate, pending the filing of the instant petition.

C. The Film, Its Production and Distribution

The film "Deep Throat" was conceived and written in late 1971. The writer and director was Gerard Damiano. The picture was financed by Louis Peraino. It was filmed in Miami and New York City.

For approximately an hour, "Deep Throat" portrays the sometimes humorous, sometimes sad and frequently explicit efforts of a young lady to achieve sexual satisfaction. The storyline is well known to the countless millions of persons who paid to view the film and the many additional millions who have read about it. We respectfully request that the Court view the film, in connection with our contention that it is not legally obscene.

The evidence at trial falls into four distinct time periods, if unauthorized distributors are not included.[1]

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[1] Distribution of the film, without the permission of its owner, is called "bootlegging." Government witnesses testified that "Deep Throat" was the subject of a great deal of bootlegging (T.1558, 1622-4, 1615, 1945, 2047, 2693).

1. The production of the film from late 1971 to April, 1972 by Petitioners Louis Peraino and Gerard Damiano Film Productions, Inc., and by alleged co-conspirator Gerard Damiano. (Trial Transcript, at pp. 1224-1283).

2. The distribution of the film by Petitioners Louis Peraino and Gerard Damiano Film Productions, Inc. until they sold it to a foreign corporation in November, 1973. (Id., at pp. 1519, 1774, 1859-1864, 1896-1901, 1921, 1948)

3. Robert DeSalvo (an indicted defendant who has been a fugitive since prior to the first trial), a prior bootlegger of the film, thereafter acquired the United States distribution rights from a Bahamian corporation, and continued to distribute it until December, 1974. It was at DeSalvo's direction that the film was transported to Memphis. (Id. at pp. 1525-1550, 1663-1668, 2351, et.seq. 1973-1996, 3443-3445.)

4. Distribuiton of the film in the Eastern United States by Joseph Peraino (uncle of co-defendant Louis Peraino) and his corporation, Plymouth Distributors, Inc., from January 1975 until the filing of the indictment in June, 1975. (Id. at 3053-3060, 3455-3464).

The only issues at trial were: (1) Who was responsible for the distribution of the film to Memphis, i.e., what was the legal scope of the alleged conspiracy, (2) Is the film obscene; and (3) Was there a constitutionally impermissive seizure.

There was no dispute that the film was transported to Memphis at the direction of Robert DeSalvo and was exhibited in at least one theatre there for about a month.

Similarly, there was no dispute that the film was an extraordinary box office success in Memphis and throughout the country. As one government witness testified:

"As a matter of fact, what gave me the idea to put, to try to get 'Deep Throat', I was sitting home on a Sunday and I picked up the New York Times Sunday edition and going through their magazine section I found approximately four to six pages all about 'Deep Throat', and they said how chic it was . . . That

was [,] to go to this picture, they claimed that people coming up in white mink coats, that celebrities were running to it, that is what gave me the idea to try and get this picture for Florida, and since it was coming ot the height of the season in Florida, I made an effort to get it. In fact, I gave up running, I owned at that time 6 of my own theatres in New York. I gave all of that up just to go to Florida to put the picture over." (Trial Transcript, at p. 1548-1549).

ARGUMENT

Introduction

The production and distribution of the film "Deep Throat" coincided with wide-spread attitudinal changes in this country concerning sexual matters with this Court's determination to permit local communities to decide for themselves the extent to which sexually explicit materials will be tolerated beyond that which is clearly protected by the First Amendment. *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Miller v. California*, 413 U.S. 15, 24, 30 (1973); *Hamling v. United States*, 418 U.S. 87, 104-106 (1974); *Smith v. United States*, 431 U.S. 291, 300-301 (1977).

It is common knowledge, and was attested by the government's own witnesses at the instant trial, that "Deep Throat" was a box office sellout on a national scale — an unprecedented accomplishment for a film dealing with explicit sexual conduct. This case, therefore, does not present a hypothetical exploration into the frontiers of community toleration. The film's historical significance is not how prosecutorial agencies and courts have thus far dealt with it, but rather how the nation reacted to it. One must conclude that it was not merely an odd quirk that the foreman of the indicting Grand Jury herein had paid to see the film long before he was called for Grand Jury service, or that, according to him, other members of the Grand Jury had done likewise.

Part I of our argument, *infra*, demonstrates that the prosecution and conviction of Petitioners, if permitted to stand, will, for practical purposes, destroy the local community standards concept adopted by this Court in *Miller*, *supra*. The

author, producer or regional distributor of a sexually explicit film, book or magazine will be subject to a conspiracy prosecution in any community which finds such a work offensive, if a successor-in-interest or some other distributor intentionally or by error of judgement introduces the work into such a community. The chilling effect of the decision is manifest. We urge that the Court of Appeals' holding is in conflict with this Court's community standard decisions, *supra*, and presents an important question of Federal law which should be settled by this Court.

Part II, *infra*, challenges the propriety of a Grand Jury returning an obscenity indictment without ever having viewed the offending film. The Court of Appeals held, without qualification, that such a viewing is unnecessary. Moreover, the Court of Appeals held that, where no recording exists of the testimony before the Grand Jury and where no government record or prosecutorial recollection exists as to whether any description, much less an adequate description, of the offending work had been given to the Grand Jury, the questioning of Grand Jurors for their recollections would be an improper invasion of Grand Jury "secrecy". We submit that these rulings present substantial questions under the First and Sixth Amendments, which ought to be settled by this Court.

Part III, *infra*, first contends, as a matter of law, that the film "Deep Throat" was not shown to be obscene. The more stringent limits of community discretion in the evaluation of alleged obscenity must be determined within the context of what the present day national society will tolerate to be branded as being of no[2] or inconsequential value or as being patently offensive. We submit that the wide acceptance of this film, when combined with the "utterly without" value test which was applied in this case, requires the determination that it is not obscene. We additionally contend that the defense was deprived of a fair opportunity to demonstrate to the jury that the film was not violative of community standards and had social value, and further, Petitioners herein convey that the Court erred in denying their request to charge per *Smith v. United States*, *supra*, as to the tolerance of the average adult.

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[2] The "utterly without" test of *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957) was given to the jury in the present case.

Part IV, *infra*, contends that the court erred in refusing to charge the "tolerance" rationale of community standards as set forth in *Miller v. California*, *supra*, and *Smith v. United States*, *supra*.

Part V, *infra*, contends that the requiste scienter as to Petitioner Arnone and Battista "to do something which the law forbids" in violation of the community standards of the Western District of Tennessee, has not been shown by even a scintila of evidence.

Part VI, *infra*, contends that the evidence established that Petitioner Arnone affirmatively withdrew from an "alleged" conspiracy by October 1973, and the jury instructions on this issue were constitutionally inadequate and were deprivative of the Petitioner's First Amendment rights per *United States v. United States Gypsum Company*, 438 U.S. 422.

I.

THE INDICTMENT AND TRIAL IMPERMISSIBLY SOUGHT TO MASK MULTIPLE CONSPIRACIES BEHIND THE CLAIM OF A NATIONAL OBSCENITY CONSPIRACY.

THE EFFECT OF SUCH AN APPROACH IS TO ERADICATE THE SIGNIFICANCE OF LOCAL COMMUNITY STANDARDS SINCE, UNDER SUCH A THEORY, ANY LOCALITY COULD PROSECUTE THE AUTHOR, PRODUCER, AND ALL DISTRIBUTORS OF AN ALLEGEDLY OBSCENE WORK.

The Court of Appeals dismissed Petitioners' multiple conspiracy claim, without reference to the First Amendment implications of its holding that a single national conspiracy was established.

"It is clear that the indictment alleged only one conspiracy namely to transport an obscene film in interstate commerce. The conspiracy did not relate to merely one shipment to a

particular place, but was national in scope and related to many shipments made to different states."

Similarly, the Court of Appeals rejected Petitioners' contention that it was improper for a trial court to impose a dramatic nationwide disavowal obligation upon the producer of a film, in order for him to avoid subjecting himself to liability for someone else's subsequent distribution of the film to a community in which the film is violative of local community standards.

A. The Indictment

The indictment (App. A. *infra*) is jurisdictionally predicated upon the transportation of the film to Memphis from Florida, in February, 1974. It was actually shown in movie theaters in Memphis for only a brief period in February, 1974. Based upon the aforesaid transportation and exhibition, the government sought to fashion, into a single conspiracy, every person involved in the creation, distribution, transportation, and display of the film anywhere in the United States, from its creation in early 1972 until the filing of the indictment in June 1975.[3]

B. The Reversal and Dismissal with Respect to the Co-Appellant, Joseph Peraino.

Joseph Peraino and his corporation, Plymouth Distributors, distributed "Deep Throat" in the Northeastern area of the United States, commencing a number of months after the film stopped showing in Memphis. Nevertheless, the indictment asserted jurisdiction over him and the government claimed that his subsequent distribution qualified him as a member of the national conspiracy, subjecting him to a trial upon Memphis community standards.

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[3] A leading text on the subject of criminal conspiracy comments upon the exceedingly wide range of the instant indictment and singles out this indictment for reproduction in full. P. Marcus, Prosecution and Defense of Criminal Conspiracy Cases (Matthew Bender, 1978), Section 10.08 and Appendix j, thereof.

In reversing Joseph Peraino's conviction (following two trials) and in dismissing the indictment against him, the Court of Appeals has drawn a constitutionally irreconcilable line between his posture and that of Petitioners.

The Petitioners produced and distributed the film prior to the Memphis distribution, but were not shown to have had any knowledge, involvement or stake in the transportation of the film to Memphis. The Co-defendant, Joseph Peraino, only distributed the film after its brief appearance in Memphis.[4]

The Court of Appeals held:

> "The general rule that one who joins a conspiracy at any time before it ends may be held responsible for acts and agreements which took place before he joined, e.g. *United States v. Cimina*, 427 F.2d 129, 139 (6th Cir.) cert. denied, 400 U.S. 911 (1970), does not control when First Amendment rights are at stake. In most cases the illegal purpose of a federal conspiracy will be illegal in every federal jurisdiction. However, when the agreement alleged is one to distribute materials which constitute expression, the agreement may have both legal and illegal purposes depending on varying community standards.[5] When one joins an ongoingn undertaking to distribute expresssive materials interstate he should not be convicted solely on the basis of agreements and overt acts which predated his joining.[6] In order to avoid violation of such person's First Amendment rights, the government is required to prove either that he agreed to distribution of material or permitted such future distribution to occur and failed to withdraw from the conspiracy." 645 F.2d at pages 551-552.

Excerpts from the two footnotes to the foregoing amplify the Court's reasoning:

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[4] The indictment charged, and, over objection, the government proved at trial, distributions of the film to communities all over the country (App. A overt acts 14-23, 25-26).

> F.N. 5: "We do hold that to convict one as a conspirator it is necessary to prove that a purpose of the conspiracy, at the time the conspirator was a member, involved a community, the standards of which were violated by the film."
>
> F.N. 6: "In the present case, although overt acts were alleged after Peraino and Plymouth began distribution, none was shown to violate the standards of a community in which it took place." 645 F.2d 552.

We agree with the foregoing reasoning, to the extent that it recognized the lack of a proof of conspiracy as to Joseph Peraino. Its attempt to distinguish prior, similar innocent conduct on the part of petitioners, is lacking in logic.

One can be guilty of membership in a conspiracy only if he has a criminal objective. The only criminal objective property involved in this case was the distribution of the film into a community whose standards would be violated. The only community standards involved in this case were those of the Western District of Tennessee. In *Peraino, supra*, the Court of Appeals conceded that this was the case and doubted that a jury in Memphis could "properly determine" the community standards of some other locality.

Petitioners had a right to distribute the film to communities which tolerated or accepted it. There was no proof at trial that they did otherwise. There is no reason why the exercise of that right should subsequently be converted into a criminal act by virtue of the independent conduct of others who sent the film to Memphis.

We respectfully submit that the indictment and trial herein constituted an improper, retroactive extension of a local conspiracy. Petitioners were not shown to be members of a single national conspiracy, nor were they shown to have conferred jurisdiction over them upon the Western District of Tennessee. Reconciliation of the First Amendment community standards requirement and the Sixth Amendment venue requirement can led to no other conclusion. The evidence showed that Petitioner Battista booked the film "Deep Throat" in Dela-

ware, New Jersey and Pennsylvania only. The evidence also shows that after October, 1973, Petitioner Arnone was out of the National Distribution Organization and exhibiting the movie only in the State of Florida.

C. Single versus Multiple Conspiracy.

In *Kotteakos v. United States*, 328 U.S. 748, 90 L.Ed. 1557, the Court held that when a single conspiracy is charged, a single conspiracy must be proved. If at trial multiple conspiracies are proven, and a single conspiracy proven, we have a variance in the proof. That variance if prejudicial justified the dismissal of the indictment.

The issue is thus (*Berger v. United States*, 295 U.S. 78 at page 82) "is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantive rights' of the accused."

Here Battista is not shown to have caused, intended, aided, conspired or combined to transport the film "Deep Throat" into the Western District of Tennessee during his association with the film booking he engaged in in Pennsylvania, Delaware and New Jersey. This "substantial prejudice" has accrued as to Battista by a finding of "guilt" as to distribution for exhibition in the Western District of Tennessee.

Likewise, Arnone is not shown to have engaged in a single act related to the movie "Deep Throat" after October 30, 1973, and as such he too was "substantially prejudiced" by the proof of multiple conspiracies in a single conspiracy indictment.

Accordingly, the variance was "substantially prejudicial," the convictions of Arnone and Battista reversed and the indictment of the said Petitioner dismissed.

II.

THE PETITIONERS WERE EFFECTIVELY DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS TO FAIR GRAND JURY PROCEED-

INGS SINCE THE GRAND JURY NEVER VIEWED THE ALLEGEDLY OBSCENE FILM BEFORE RETURNING AN INDICTMENT, AND THE PETITIONERS WERE IMPERMISSIBLY DENIED THE RIGHT TO DEMONSTRATE THAT THE GRAND JURY LACKED AN ADEQUATE FACTUAL BASIS UPON WHICH TO INDICT.

The Court of Appeals has held in this case that it is proper for an indictment charging obscenity to be returned without the Grand Jury having ever viewed the film in question. See 646 F.2d *supra* at page 242 as follows:

> "The validity of an indictment is not affected by the type of evidence which is considered by a grand jury even though inadequate or incompetent."

When Petitioners and the other defendants then before the trial court sought to make further investigation into the proceedings of the Grand Jury in this highly unusual situation, we were precluded from extensive inquriy to demonstrate the necessary prejudice to the parties on trial under the indictment returned by the said Grand Jury. The Court in its opinion in this case,646 F.2d *supra* at page 242 stated:

> "In our opinion, it was not necessary for the district court to probe into the secrecy of the grand jury proceedings. There is a presumption of regularity which attaches to such proceedings and the defendants have a difficult burden to prove any irregularity . . . The defendants proved no irregularity in the present case. The defendants must also demonstrate a particular need that outweighs the secrecy policy."

When the Petitioners herein, together with the other defendants at the trial level, attempted to produce this evidence, they were thwarted by the rulings of the trial court not upheld on appeal by the Sixth Circuit.

Accordingly, the entire circumstances extant here, demand a dismissal of the indictment or a reward to permit counsel to

reconstruct for this Court what occurred in the Grand Jury proceedings that innured to the ultimate prejudice of the Defendants, now Petitioners.

III.

THE GOVERNMENT FAILED TO ESTABLISH THAT THE FILM "DEEP THROAT" IS OBSCENE; THE DEFENSE WAS IMPROPERLY RESTRICTED IN ITS PROOF OF THAT ISSUE; AND THE PROSECUTION WAS WRONGFULLY PERMITTED TO INTRODUCE EVIDENCE THAT THE FILM MIGHT BE HARMFUL TO SOME PEOPLE.

The opinions of this Court leave no doubt that books, pictures and films are presumptively protected by the First Amendment, and that, to remove that presumption with respect to any particular item requires that the government establish, beyond a reasonable doubt, that the item is obscene.

In the present case, it was the government's burden to establish that the film violated *each* of the three criteria which are set forth in the stipulation which is quoted, *supra*. In fact, the government offered no proof as to any of those criteria. Instead, over objection, the government's single expert witness[5] was permitted to testify as to alleged harmful effects that the film *might* have upon certain susceptible adults. The harmful effect claim plays no role in any of the criteria which have been articulated by this Court.

We respectfully submit that the government's proof on this issue deprived the defendant of a fair trial since such proof is, itself, violative of the First Amendment and irrelevant to the issue of obscenity.[6]

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[5] Victor Cline, a Salt Lake City psychologist.

[6] The Court denied a defense request to instruct the jury that possible harmful effect may not be taken into consideration during the determination of whether the film is obscene, particularly if the film has any social value. We urge that the failure to give such an instruction was reversible error (Trial Transcript, at pp. 4833-4836).

A. Prurient Interest

The first criterion to be met was, "whether the average person, applying contemporary community standards, would find that the movie, taken as a whole, appeals to the prurient interest in sex." The only knowledge that the prosecution witness had of the contemporary community standards of Memphis was that it had "topless and bottomless places," 13 adult bookstores and four adult theaters which showed sexually explicit movies." (Trial Transcript, at 3894-96).

Highly qualified defense experts,[7] unequivocally testified that the film does not appeal to a prurient interest, but rather, appeals to a healthy curiosity in sex and tends to overcome prurient attitudes which are generated by ignorance.

B. Patent Offensiveness

The second criterion is whether the movie affronts contemporary community standards by depicting ultimate sex acts in a patently offensive way. There can be no doubt that "Deep Throat" depicts ultimate sex acts, but it is not conceded that the same were presented in a patently offensive way.

The government's proof offered no guidance to the jury on this issue. As was the case in the rest of the country, when the film was shown in Memphis it was a box office sellout. At least three members of the Grand Jury that returned the instant indictment saw the film before they were called to serve on the Grand Jury. For a film that played in Memphis for barely a month, that statistical indication of community acceptance is quite significant.

A defense expert, with intimate knowledge of the Memphis area community, testified as to the extent to which comparable materials had been accepted by a cross-section of persons in

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[7] The defense witnesses were: (1) Stanley L. Poltnow, Professor of Psychiatry, New York University School of Medicine; (2) Patricia D'Encarnacao, Memphis Psychiatrist and Director of the Mid-South Center for Marital and Sexual Therpay; (3) Otto Larsen, a Sociologist and former chairman of the President's National Commission on Obscenity and Pornography.

that community, including representatives of religious groups (Trial Transcript, at 4178-4188, 4243).

C. Comparable Materials

The trial court submitted reversible error in refusing to permit the jury to view slides[8] that were regularly utilized by a defense expert in sex education programs throughout the Memphis area. The slides depict numerous types of heterosexual activity, including a veritable duplication of the classic "Deep Throat" technique, and in the opinion of the defense expert, the slides were comparable to the film "Deep Throat" (Trial Transcript, at 4187-4188, 4214). After viewing the slides, the trial court found them not to be comparable, and refused to permit them to be shown to the jury (Trial Transcript, at 4225, 4229, 4238).

The failure of the trial court to permit the slides to be shown to the jury deprived the defense of a fair opportunity to meet the issue of obscenity and demonstrate community acceptance and social value.

D. Social Value

It was the burden of the prosecution to establish that the film was "utterly without redeeming social value." This Court has held it to be virtually impossible for the government to sustain such a burden. *Miller v. California, supra.* In view of the trial proof it can hardly be said that the government accomplished that virtual impossibility.

The approach of the government expert to the question of social value was to concede that there were parts of the film that could serve as an appropriate educational purpose but that those parts were overshadowed by other "pathological elements in the film" (Trial Transcript, at 3594-95, 3769). When pressed on the subject, he conceded that his opinion was based not upon the merits of "Deep Throat," itself, but rather upon the theory that "Deep Throat" would set a precedent for a whole series of other films (Trial Transcript, at 3718).

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[8] Exhibit 201, for identification.

In short, his argument seemed to be that whatever educational value the film might have was overcome by the possibility that such a film and others after it might gain communtiy acceptance. He, thus, created an ironic and contradictory tension between the concepts of community standards and educational value.

To the contrary, the defense experts, all of whom were far more experienced and professionally qualified, made clear that the film possesses a great deal of educational, social and therapeutic value.

E. Intent and Manner of Distribution

Each of the government witnesses, who had participated in the distribution or exhibition of the film, testified that he did not believe such activity was criminal. Similarly, it was undisputed that the film was exhibited only to consenting adults and that children were excluded.

Eighty percent (80%) of the film had a musical score, which is an integral part of the movie and of the story line (*Id.*, at pp. 1264, 1277).

Additionally, film libraries, such as the Library of Congress and commercial film outlets were utilized to secure film footage, of a non-sexual nature, which was used for special effects throughout "Deep Throat" (Trial Transcript, at p. 1267).

Much of the government's proof, unnecessary to recount here, was devoted to establishing that the film "Deep Throat" was seen by countless *millions* of people throughout the United States, with people waiting in long lines to view the film. That proof demonstrated that the film had been accepted by communities throughout the country and had been an overwhelming box office success as compared to the vast majority of films. Typical of such films was that of government witness, Pat Baca.

Baca is a theater owner in Albuquerque, New Mexico. He commenced exhibiting the film in 1973 (*Id.*, at pp. 1551-53, 15563). Albuquerque has a population of 300,000 people and

about 35 to 40 movie theaters. The picture would run from 11:00 a.m. until about midnight, and the theater was continually full and people had to be turned away. He continued displaying that picture until the summer of 1978 (five and one-half [5½] years). It was the longest continuing motion picture booking that there has ever been in Albuquerque (*Id*, at 1569, 1571).

How is it possible that a film, which has been accepted by countless millions of adults in this country, both in Memphis and elsewhere, can be found to be violative of community standards?

It may be relevant as to whether the persons who distributed the film engaged in "pandering." There was no evidence introduced at this trial that anything but inoffensive advertising was utilized with respect to the marketing of this film. Advertising consisted of two types of materials. The first is a poster of the type that is generally displayed in the lobby of a theater. The poster which was used to advertise "Deep Throat" was received in evidence as Government Exhibit 100 and we urge this Court to examine it. The second form of advertising is called an ad mat which is provided to local movie theaters so that they can use it to advertise in local newspapers. Such an ad mat was received in evidence as Government Exhibit 32A and we urge this Court to examine it.

Pursuant to the motion picture code, the poster and the ad mat bore the "X" symbol in order to alert the public that the movie was sexually explicit. This type of advertising does not constitute the kind of evidence of pandering deemed significant in *Ginzburg v. United States*, 383 U.S. 629 (1968). The film "Deep Throat" was not proved by the government to be obscene under Parts 1 annd 2 of the *Miller* test, and further, the "pandering" installation violated Petitioners' First Amendment and Due Process rights when the evidence adduced at the trial did not warrant such instructions.

IV.

THE COURT'S CHARGE TO THE JURY ON COMMUNITY STANDARDS, REFUSING, AS IT

DID, TO INCORPORATE THE CONCEPT OF "TOLERANCE" DEEMED SIGNIFICANT BY THIS COURT IN *SMITH V. UNITED STATES* 431 U.S. 291 (1977) VIOLATED PETITIONERS' RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT, WHEN DEALING WITH PRESS MATERIALS WITHIN THE PENUMBRA OF THE FIRST AMENDMENT.

In the case of *Miller v. California*, 413 U.S. 15, at page 32, the Chief Justice, writing for the majority states:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas or New York." (Emphasis supplied)

Footnote 13 of that opinion quoting in part from the opinion of Mr. Justice Brennan in *Jacobellis v. Ohio*, 378U.S. 184, at pages 195-196 reads in part as follows:

> "The use of 'national' standards, however, necessarily implies that material is found *tolerable* in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable."

The Court in *Smith v. United States*, 431 U.S. 301, (1977) at page 306 stated:

> "Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the *tolerable* of the average person in their community, does not mean, as has been suggested that obscenity convictions will be virtually unreviewable." (Emphasis supplied)

Had the Petitioner here been charged under Tennessee State statutes applying Federal Constitutional standards dealing with "press materials" being prosecuted as obscene, clearly it would have been required in the State of Tennessee

that "tolerance" not "acceptance" be the appropriate standard to be charged as an instruction to the jury. In the case of *Leech v. American Booksellers*, 582 S.W.2d 738 (1979) the Supreme Court of Tennessee observed; "It is obvious that the 'acceptance' test would lead to the indiscriminate branding as obscene, much of protected speech that would otherwise pass the *tolerable* test." (Emphasis supplied)

Thus Petitioners should have, under the rather inconsistent opinion of the Sixth Circuit in the companion case of *Peraino*, 645 F.2d *supra* at page 551, dealing with conspiracies that may lie within the parameters of the First Amendment one place and not the other, been given this requested instruction on tolerance. (see 646 F.2d *supra* at page 245.)

Two states have used the terms "acceptance" and "tolerance" interchangeably.

Louisiana: *State v. Short*, 368 So.2d 1078, 1083
Georgia: *Flynt v. State*, 153 Ga.App. 232

More recently, June 23, 1981, a panel of the Fifth Circuit Court of Appeals in the case of *Red Bluff Drive-In, Inc. v. Vance, et al.*, 648 F.2d 1020, at page 1029, deemed significant the concept of "tolerance" in determining whether to proceed to invalidate the Texas Statutory scheme regulating obscenity prosecutions, as being in conflict with the First Amendment and the decisions of this Court dealing with this issue since *Miller* in 1973.

The Fifth Circuit reversed in part on that issue, giving to the Texas courts an opportunity to determine the legislative intent. In doing so the Court stated:

> "As the final arbiters of the Texas legislature's intent, state courts deserve the first opportunity to decide if the Legislature intended to hold obscenity defendants to the community's norms of 'proper' behavior and 'taste' as opposed to a minimum standard of conduct the community is willing to *tolerate*." (Emphasis supplied)

The Petitioners herein contend the jury should have been

charged on their theory of the case as to the contemporary community standards of "tolerance" of the average adult. The failure to so charge is of constitutional dimensions.

See Footnote 7 in *Red Bluff Drive-In, Inc. v. Vance, et al.*, 648 F.2d *supra* at page 1029.

V.

THE SCIENTER OF PETITIONERS HEREIN AS TO (1) THE CONTENTS, CHARACTER, AND NATURE OF THE FILM "DEEP THROAT", AND (2) THE KNOWLEDGE OF IT'S DISTRIBUTION INTO THE WESTERN DISTRICT OF TENNESSEE IN FEBRUARY, 1974 HAS NOT SHOWN BY THE EVIDENCE AND/OR PROPERLY CHARGED TO THE JURY CONSISTENT WITH PETITIONERS' DUE PROCESS RIGHTS WHEN DEALING WITH "PRESS MATERIALS" WITHIN THE PENUMBRA OF THE FIRST AMENDMENT.

The Appellate Court in the *Battista* case. 646 F.2d on page 242 held as follows:

> "The scienter required to support a conviction present case is that appellants knew the general nature and character of the film. All of the appellants had such knowledge as was clearly shown by the evidence. It was not clearly shown by the evidence. It was not necessary that the defendants have personal knowledge of the community standards in each and every place where they distributed the pornographic films."

In support of the foregoing comment, the Sixth Circuit Panel cites in support the decision of *Hamling v. United States*, 418 U.S. 87. That case interestingly enough stands for the proposition that it is *knowledge* of *nature*, *character*, and *content* which is relevant in determining scienter. See page 123 where the court observes: "We think the 'knowingly' language of 18

U.S.C. 1462, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials."

Accordingly, it would appear that contents is not a relevant ingredient of any obscenity prosecution in the Sixth Circuit, and such was omitted from the instructions given the jury.

Notwithstanding the departure of the Sixth Circuit from the language of the Supreme Court of the United States in *Hamling, supra,* that court was clearly inconsistent in its rulings in the majority opinion in the *Peraino* case (645 F.2d 548) which was a companion case to *Battista, et al.,* and which was tried together and consolidated for trial.

Circuit Judge Lively, writing for the majority in Peraino at page 551, says in pertinent part as follows:

> "One who has no connection with the district of venue at the time of the venue-setting act may not be convicted there for subsequently transporting the materials into other communities whose standards were not established."

The evidence as to Battista clearly establishes that his participation in he distribution of the film "Deep Throat" was limited to the geographical areas encompasing Pennsylvania, Delaware, and New Jersey. At no time was he involved in the shipment, exhibition, or transportation of the film into the Western District of Tennessee. How then may we adress the logic of the Sixth Circuit opinion in creating an artificial distinction that permitted the Federal prosecutor to engage in constitutionally prohibited "forum shopping" when dealing with cases failing within the penumbra of the First Amendment.

Likewise, the evidence clearly established that Arnone was not associated with the interstate distribution of the movie "Deep Throat" after October 1973, and but for the rule applied

by the Sixth Circuit in *Blue v. United States*, 138 F.2d 351 (CA-61943) then Arnone also should have been exculpated from the case under the theory established by this Court in it's rationale in deciding the *Peraino* case of even date. This court at page 645 of the *Peraino*, case (645 F.2d, *supra*) states:

> "The material is entitled to First Amendment protection except where it violates community standards. Here, . . . the conspirators were engaged in its distribution in other communities where it was not shown to be illegal, and therefore is presumed to be legal."

Accordingly, if there was no showing by the Federal prosecutors that communities in which Petitioners Arnone and Battista distributed the movie "Deep Throat" had determined through any judicial process that the same was illegal, then it follows that it would have been presumed to have been presumptively protected under the First Amendment to the Constitution and thus scienter could not attach to them. Further, scienter is only one aspect of the concept of "knowingly". It must be affirmatively shown by the prosecution that the interstate transportation into the Western District of Tennessee was intended by the two(2) petitioners herein. This was certainly not proven in the case at bar, and thus substantial Due Process rights of Battista and Arnone have been violated by the decision of the Sixth Circuit.

VI.

THE JURY INSTRUCTIONS, AS TO PETITIONER ARNONE ON THE CONCEPT OF "WITHDRAWAL" FROM A CONSPIRACY WERE CONSTITUTIONALLY INADEQUATE AND VIOLATED HIS DUE PROCESS RIGHTS

The trial court's instructions regarding the issue of withdrawal from a conspiracy are set forth on page 246 of 646 F.2d, *supra*, and give the jury two (2) examples as to what a defendant must prove to show that he has withdrawn from a conspiracy and they include (a) making a clean breast to the authorities or (b) communicating to his co-conspirators his aban-

donment by some effective means. Arnone argues by his appeal that these two examples were unduly limiting and might lead a jury to believe that only such dramatic conduct will constitute relevant evidence of withdrawal.

This Court in *United State v. United States Gypsum Co.*, 438 U.S. 422 at page 463-464, has criticized this type of instruction and that standing alone constituted reversable error. That result should certainly obtain in equal force to the arguments presented by Petitioner Arnone on this issue. In the *United States Gypsum Co.* case *supra*, this Court stated:

> "The charge fairly read, limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy. Nothing we have been able to find in the case law suggests, much less commands, that such confining blinders be placed on the jury's freedom to consider evidence regarding the continuing participation of alleged conspirators in the charged conspiracy. . . . We conclude that the unnecessarily confining nature of instruction, standing alone, constituted reversible error."

The Sixth Circuit relied on *Blue v. United States*, 138 U.S. 351 (6th Cir. 1943) in upholding the instruction given by the trial judge as to Arnone in the case at bar concerning the concept of withdrawal from a conspiracy.

Clearly, the Court there was being totally inconsistant when in the *Peraino* case (645 F.2d 548) it fashions a rule that different standards apply as to conspiracy prosecutions "when First Amendment rights are at stake." (See also Footnote 1 of the *Peraino* opinion at page 551 thereof.

> Quare: If the conspiracy alleged is not illegal in most communities where the film is to be transported for exhibition, then under what sense of legal logic should Arnone have engaged in any effort to affirmatively "disavow or defeat the purposes" of an alleged nationwide conspiracy.

Should Arnone have sent a registered letter to every co-

conspirator, of which approximately one hundred fourteen (114) appear in the indictment, plus the unnamed co-conspirators. As this Court said in the *United States Gypsum Co.* case, 438 U.S. 422, *supra*, at page 464, footnote 37, "in this case the obligation to notify 'each other member' of the charged conspiracy would be a manageable task; in other situatons all 'other' members might not be readily identifiable." In the *Gypsum* indictment, six (6) major manufacturers and various of their corporate officials were charged with violation of the Sherman Act. In the case at bar, we have over 114 different named individuals and a host of unnamed individuals, and to notify each and every one would be unmanageable for Mr. Arnone, and the court in its instructions holding Mr. Arnone to that standard was violating his Due Process rights.

The other example given by the trial court to the jury and condemned by this Court in the *United States Gypsum Co.* case, *supra*, was that Arnone could have shown by the evidence that he did something to defeat the purpose of this "First Amendment" conspiracy.

Should Arnone have called the FBI and advised them that a movie showing "explicit sexual activity" (prior to *Miller v. California*, *supra*, narrowing the geography involved in an obscenity prosecution and broadening the standards which may be used by prosecutors) by the name of "Deep Throat" was about to be distributed nationwide by some of the former associates, notwithstanding the standards of any particular community?

Perhaps Arnone should have written a letter to the United States Attorney for each and every judicial district in the United States of America to advise that certain former associates were planning nationwide distribution of the movie "Deep Throat" that was currently being advertised and exhibited to "millions of adults throughout the United States, and that he ceased his participation in October, 1973, save and except for the State of Florida.

Under the rationale of the Sixth Circuit opinion upholding the trial judge's instructions to the jury on the affirmative defense of "withdrawal from a conspiracy" and what is re-

quired to be proved by the Petitioner Arnone, no doubt Arnone should have taken a full page advertisement in the trade papers telling all that he was no longer associated with the national distribution of the movie "Deep Throat."

Surely, the Sixth Circuit panel could have relied on some case other than *Blue v. United States, supra,* when it had the wisdom expressed by this Court in the 1978 decision of *United States v. United States Gypsum Co., et al.,* 438 U.S. 422 available to guide its judgment on this issue.

The jury instructions given by the trial court on this point clearly require Arnone to either:

(i) Notify each and every so-called co-conspirator. (Approximating in excess of one hundred fourteen throughout the country; or

(ii) Prove that he had done something to defeat the purpose of the conspiracy he had withdrawn from.

Clearly, this case falls within the rationale of this Court's opinion in *United States v. United States Gypsum Co., et al.,* 438 U.S. 422, and as such the conviction as to Arnone should be reversed on the grounds of Due Process.

In cases dealing within the penumbra of the First Amendment, the concept and rationale of the decision of the Sixth Circuit in Arnone's case is unwarranted and violates his First and Fifth Amendment rights.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT EUGENE SMITH
Counsel for Petitioners

Los Angeles, California
August 11, 1981

APPENDIX A

Order Denying Rehearing

Case Nos. 79-5165/79-5257

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America, *Plaintiff-Appellee*, v.
Anthony Battista (79-5165) and
T. Anthony Arnone (79-5257) *Defendants-Appelles*

O R D E R

Before WEICK, LIVELY and KENNEDY, Circuit Judges.

Upon consideration of the Consolidated Petition For Rehearing filed by Defendants-Appellants Anthony Battisti and T. Anthony Arnone, it is ORDERED that said Consolidated Petition For Rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK

/S/

Chief Deputy Clerk

FILED

JUN 12 1981

JOHN P. HEHMAN, Clerk

APPENDIX B

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

From on or about the 26th day of February 1971 up to and including the present, in the Western District of Tennessee and divers other places,

ANTHONY JOSEPH PERAINO
ROBERT J. DeSALVO
T. ANTHONY ARNONE
HERBERT NITKE
MICHAEL CHERUBINO
LOUIS PERAINO
ANTHONY BATTISTA
JOSEPH PERAINO
CARL R. CARTER
MEL FRIEDMAN
HERBERT STREICHER
MARIO DeSALVO
BRYANSTON DISTRIBUTORS, Inc.
GERARD DAMIANO FILM PRODUCTIONS, Inc.
AMMA CORPORATION
MAINES & ASSOCIATES, Inc., and
PLYMOUTH DISTRIBUTORS, Inc.

hereinafter referred to as defendants generally or by specific name, and Anthony Albanese, Louis Albanese, Bill Albert, Art Theater Guild Inc., Norman Arno, James Barlock, Robert Bernstein, Larry Carr, Hank Cartwright, Archie Cavelli, Joseph Confora, John Crandall, Robert Cunningham, Gerard Damiano, Raymond Damiano, Fernando deCespedes, Ercole DeColla, Anthony Del Pra, Vincent DeStefano, Bob Doebel, Willis J. Doebel, Hubert England, Joao Fernandez, Rober Fiori, John Fortuna, Tom Frederick, Walter Gernert, Robert Gordon, Joseph Gougen, Great Scott Advertising Co., Bruce

Green, Alfred Gregg, Richard Haes, Jack Haggerty, Stu Harnell, Ed Hertzmark, Lloyd Hess, Arnold Himmelstein, Bill Higgins, Carl Jamroga, Arnold Jordan, John Kaboord, Ronald Kay, William Kendall, Robert Lane, John Pierre LeCoz, Terrance Levine, Vincent Maida, William V. Mallozzi, Carmen Mallzone, Philip Manier, Plato Manouse, Michael Mann, John Marrone, William Martin, Roy Meekins, Anne Miller, Larry Miller, Lynette Minton, Angelo Miragliotta, Vincent Miranda, Motion Pictures Accessories, Inc., Curtis Muck, Bill McLeese, Ed McLeese, James Newman, Anthony Novello, Anthony Oteri, Joseph Oteri, Angelo Palma, Phillip Parisi, Michael Pollack, Norman Reeb, Chuck Roe, Juanita Rossi, Pete Rossi, Sam Rossi, Steve Sabella, John Sangston, Gil Saule, Ron Schenk, Raymond Shipley, Stan Siebert, Arthur Sommer, Barbara Stamp, Barbara Stolyts, Herbert Streicher, Joseph Sykes, Louis Tabak, Phillip Teri, Joseph Torchio, Jr., Charles Traynor, Linda Traynor, Arthur Weisburg, Ronald Wertheim, Ross Wheeler, Thomas Wilson, and Italo Zoccollilio, and others whose names to the Grand Jury are unknown, named herein as co-conspirators but not as defendants, unlawfully combined, conspired, confederated, agreed and planned to engage in conduct against the laws of the United States by knowingly transporting in interstate commerce by common carrier and transporting in interstate commerce for the purpose of sale and distribution an obscene, lewd, lascivious and filthy motion picture film, that is one depicting patently offensive hardcore sexual conduct including lewd exhibition of genitals, masturbation and ultimate sex acts, which appeals to the prurient interest in sex and which exceeded and exceeds the standards of the average person applying contemporary standards relating to the depiction of sexual matters and which has no serious scientific, literary, artistic or political value, entitled "Deep Throat" in violation of Title 18, United States Code, § 1462 and § 1465.

Said conspiracy was initiated by an agreement between Gerard Damiano and Louis Peraino to form a business relationship between themselves for the purpose of distributing and producing for distribution sex oriented motion picture

films. Thereafter Gerard Damiano Film Productions, Inc. was formed to carry out this purpose. Once in business, said corporation acting by and through Gerard Damiano and Louis Peraino purchased a motion picture film entitled "Changes" and produced a motion picture film entitled "Sex U.S.A." and commenced distributing same for public exhibition. Thereafter, plans were initiated to produce a motion picture film which was one depicting patently offensive hardcore sexual conduct to include lewd exhibition of genitals, masturbation and ultimate sex acts, which appeals to the prurient interests in sex and which exceeded the standards of the average person applying contemporary standards relating to the depiction of sexual matters and which had no serious scientific, literary, artistic or political value, which was ultimately entitled "Deep Throat". Once produced, said motion picture film was distributed throughout the United States for public exhibition by Gerard Damiano Film Productions, Inc. In approximately November 1972, Bryanston Distributors, Inc. was incorporated by Louis Peraino and others. Gradually, thereafter Gerard Damiano Film Productions, Inc. was phased out of existence and primary responsibility for the distribution of "Deep Throat" shifted to AMMA Corporation in Florida and Bryanston Distributors, Inc. continued to receive money for these efforts of AMMA Corporation.

The object of said combination, conspiracy, confederation, agreement and plan was for the defendants and other coconspirators to act in concert to achieve a common goal, to wit, to profit financially the defendants and other coconspirators, by obtaining public notoriety for said motion picture film and the actor and actresses therein in order to and in furtherance of an effort to pander said motion picture film to the end that paying patrons would be enticed to attend public exhibitions of said motion picture film throughout the United States. Other goals of said combination, conspiracy, confederation, agreement and plan designed primarily to obtain and enhance the ultimate goal, including but was not limited to, soliciting sub-distributors and exhibitors, assisting exhibitors in advertising and pandering, delivery of prints of said motion picture film to theaters through-

out the United States, collecting monies and making all necessary business arrangements to physically place prints of said motion picture film in the possession of theater operators for exhibition to the public. It was a further goal of said combination, conspiracy, confederation, agreement and plan to promote said motion picture film and the actors, actresses and producers so as to create public name recognition, fame and acclaim for them.

At the times hereinafter mentioned, the following overt acts were engaged in to further and effect the goals of said combination, conspiracy, confederation, agreement and plan:

1. On or about February 26, 1971, Gerard Damiano, Louis Peraino and Vincent DeStefano incorporated Gerard Damiano Film Productions, Inc. in New York.

2. In approximately March 1971, Gerard Damiano and Louis Peraino purchased from Cinex Films a motion picture film entitled "Changes" later re-titled "All About Sex" and later re-titled "All About _____."

3. In approximately July 1971, Gerard Damiano and Louis Peraino produced for distribution a motion picture film entitled "Sex U.S.A."

4. In approximately the Fall of 1971, Gerard Damiano, Louis Peraino, Charles Traynor and Linda Traynor met together in New York, New York and agreed that Linda Traynor would play the female lead role in a motion picture film to be produced by Gerard Damiano and Louis Peraino later entitled "Deep Throat".

5. In approximately December 1971, Louis Peraino and Gerard Damiano entered into an agreement with Linda Traynor that in return for remuneration said Linda Traynor would play the female lead role in a motion picture film which was later entitled "Deep Throat".

6. In January 1972, Anthony Peraino travelled by automobile from New York, New York to Miami, Florida.

7. Between January 10, 1972 and January 19, 1972, Anthony J. Peraino, Linda Traynor, Charles Traynor, Gerard Damiano, Joao Fernandez, Ronald Wertheim and Herbert

Streicher travelled from New York, New York to Miami, Florida.

8. In approximately February 1972, Archie Cavelli developed an answer print of a motion picture later entitled "Deep Throat" at the instruction of Gerard Damiano.

9. In approximately February 1972, Phillip Parisi, as an employee of Gerard Damiano Film Productions, Inc. and under the instruction of Louis Peraino and Gerard Damiano commenced booking "Deep Throat" with exhibitors and subdistributors.

10. Between February 1972 and May 1972, Phillip Parisi entered into an agreement on behalf of Louis Peraino with Arnold Jordan on behalf of Art Theater Guild, Inc. allowing for Art Theater Guild, Inc. to distribute the motion picture film "Deep Throat" to the Studio Theater, Memphis, Tennessee for public exhibition.

11. In approximately May 1972, William Kendall in Memphis, Tennessee, acting on behalf of Art Theater Guild, Inc., ordered accessories including a film clip known as a "trailer" or "previews" of a motion picture film entitled "Deep Throat".

12. In May 1972, the film clip from the motion picture "Deep Throat" known as the "trailer" or "previews" was shown for public exhibition at the Studio Theater, Memphis, Tennessee.

13. In approximately April 1972, Louis Peraino paid Gerard Damiano approximately $15,000 for the interest of Gerard Damiano in Gerard Damiano FIlm Productions, Inc.

14. Between approximately May 1, 1972 and September 1, 1972, Phillip Parisi, on behalf of Gerard Damiano Film Productions, Inc., arranged with and for Ross Wheeler, on behalf of Wheeler Film Co., Washington, D. C., to act as a subdistributor of "Deep Throat".

15. In 1972, Louis Peraino granted permission to Joseph Torchio, Jr., Norman Arno and Vincent DeStefano to book and distribute "Deep Throat" in California.

16. In 1972, Phillip Parisi, as an employee and on behalf of Gerard Damiano Film Productions, Inc., booked and distributed "Deep Throat" for exhibition by Vincent Miranda in

theaters owned or controlled by him in Los Angeles, California.

17. In 1972, Gerard Damiano Film Productions, Inc. booked and distributed "Deep Throat" for exhibition and redistribution by Arthur Weisberg, acting by and through Gail Film Distributors, Inc., Detroit, Michigan.

18. In 1972, Phillip Parisi, as an employee and on behalf of Gerard Damiano Film Productions, Inc., granted Arnold Jordan, as an employee and on behalf of Art Theater Guild, Inc., permission to exhibit "Deep Throat" in theaters owned or controlled by Art Theater Guild, Inc. throughout the United States.

19. In 1972, Gerard Damiano Film Productions, Inc. granted permission to Hank Cartwright, acting for and on behalf of Las Vegas Cinemas, Inc., to exhibit "Deep Throat" in theaters owned or controlled by Las Vegas Cinemas, Inc.

20. In approximately December 1972, Arthur Sommer approached Phillip Parisi and Louis Peraino at Gerard Damiano Film Productions, Inc. seeking permission to obtain a copy of "Deep Throat" for exhibition at the Sheraton Theater, Miami Beach, Florida.

21. In January 1973, Arthur Sommer, as an exhibitor, played "Deep Throat" at the Sheraton Theater, Miami Beach, Florida.

22. In approximately March 1973, Robert Bernstein introduced Arthur Sommer to T. Anthony Arnone.

23. In approximately April 1973, T. Anthony Arnone requested of Arthur Sommer permission to exhibit "Deep Throat" in theaters owned by him in Florida.

24. In approximately April 1973, T. Anthony Arnone introduced Arthur Sommer to John Kaboord.

25. On or about May 1, 1973, Larry Carr was granted permission by Anthony Joseph Peraino to exhibit "Deep Throat" at the Cine I and Cine II theaters in Hollywood, Florida.

26. On or about May 15, 1973, John Kaboord exhibited "Deep Throat", having obtained same by permission of Arthur Sommer, in Pensacola, Florida.

27. Between June and August 1973, Anthony Joseph Peraino suggested that Robert J. DeSalvo and T. Anthony Arnone form a business relationship for the purpose of being the national distributors of "Deep Throat".

28. In approximately August 1973, Anthony J. Peraino consented to allow Robert J. DeSalvo and T. Anthony Arnone to distribute the motion picture film entitled "The Devil In Miss Jones" through the same channels as "Deep Throat".

29. On or about August 20, 1973, T. Anthony Arnone formed AMMA Corporation in the State of Florida.

30. In approximately September 1973, T. Anthony Arnone and Robert J. DeSalvo opened checking accounts in the name of Ivanhoe Film Distributors, Inc. and AMMA Corporation at American National Bank & Trust Company of Ft. Lauderdale, Ft. Lauderdale, Florida.

31. On or about October 1, 1973, Robert J. DeSalvo hired Robert Bernstein as an employee of AMMA Corporation to book "Deep Throat" and "The Devil in Miss Jones" for exhibition at theaters throughout the United States excluding bookings which would be in competition with the previously made arrangements more specifically set out in Overt Acts Nos. 15, 16, 17, 18 and 19 above.

32. On or about November 1, 1972, Bryanston Distributors, Inc. was formed as a corporation in New York, New York.

33. In the Fall of 1973, Michael Cherubino, acting for and on behalf of Anthony Peraino, assumed the non-official position of bookkeeper-non-supervisory overseer at AMMA Corporation.

34. From on or about October 1, 1973 up to and including December 31, 1973, Robert J. DeSalvo and Anthony Battista engaged in numerous telephone conversations.

35. On or about November 1, 1973, Robert J. DeSalvo moved the base of operations of AMMA Corporation from Plantation, Florida to Wilton Manors, Florida.

36. On or about November 26, 1973, Robert J. DeSalvo and Joseph Confora commenced doing business as Shore Distributors, 508 Warren, Springlake, New Jersey.

37. On or about November 26, 1973, Joseph Confora, acting on instructions from Robert J. DeSalvo, opened check-

ing account No. 58-411-8 in the name of Shore Distributors at First National State Bank of the Jersey Coast at Springlake, New Jersey.

38. On or about December 1, 1973, Robert Bernstein employed Willis J. Doebel and Richard Haes as representatives of AMMA Corporation in Des Moines, Iowa.

39. On or about December 5, 1973, at Wilton Manors, Florida, Ronald Kay falsely advised the United States Marshal seeking to serve a Grand Jury subpoena that he was unaware of the location of the base of operations for AMMA Corporation.

40. On or about December 3, 1973, Michael Cherubino deposited a $30,000 check to the account of Regal Enterprises at Commercial Bank of Hollywood, Hollywood, Florida.

41. On or about January 9, 1974, Michael Cherubino deposited a $15,000 check to the account of Regal Enterprises at Commercial Bank of Hollywood, Hollywood, Florida.

42. On or about January 16, 1974, Michael Cherubino deposited a $30,000 check to the account of Regal Enterprises at Commercial Bank of Hollywood, Hollywood, Florida.

43. On or about January 30, 1974, a $65,000 check payable to Haunted House was drawn on the account of Shore Distributors at the First National State Bank of the Jersey Coast at Spring Lake, New Jersey.

44. In February 1974, Robert Bernstein, acting for and on behalf of AMMA Corporation, made arrangements with Mel Friedman for "Deep Throat" to be exhibited at the Paris Theater, Memphis, Tennessee.

45. In approximately February 1974, Michael Cherubino and another male Caucasian, whose name is, as yet, to the Grand Jury unknown appeared in Memphis, Tennessee and engaged in conversation with Bob Lundry at the Lamar Theater, Memphis, Tennessee.

46. In approximately February 1974, William V. Mallozzi travelled from Memphis, Tennessee to Ft. Lauderdale, Florida and met with Robert J. DeSalvo and agreed to pay Robert J. DeSalvo a sum of money.

(Cont. Cont'd.)

47. In February 1974, the motion picture film entitled "Deep Throat" was shown for public exhibition at the Studio Theater and the Lamar Theater in Memphis, Tennessee.

48. On or about April 1, 1974, Mario DeSalvo assumed supervisory control, on behalf of Robert J. DeSalvo, over Shore Distributors, 508 Warren Avenue, Spring Lake, New Jersey.

49. In April 1974, Robert J. DeSalvo published American Films as a fictitious business name to do business in Wilton Manors, Florida.

50. On or about June 1, 1974, Joseph Peraino assumed control of Shore Distributors, 508 Warren Avenue, Spring Lake, New Jersey.

51. In approximately June 1974, Michael Cherubino moved his residence from New York to Plantation, Florida.

52. On or about July 1, 1974, office space was rented by Robert Bernstein, acting on behalf of and in accordance with instructions from Robert J. DeSalvo, at 1800 North Highland, Los Angeles, California and employed Arnold Himmelstein as the representative of Robert J. DeSalvo at that location.

53. In October 1974, Robert J. DeSalvo formed a company doing business as Maines & Associates, Inc. in the State of Florida.

54. On or about January 5, 1975, Joseph Peraino closed the office of American Films and Maines & Associates, Inc. in Wilton Manors, Florida.

55. On or about January 7, 1975, Joseph Peraino opened checking account No. 0312-0430-154-108-5 in the name of Plymouth Distributors, Inc. at Ocean County National Bank, Point Pleasant, New Jersey.

56. On or about July 29, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167084 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000 payable to Caribbean Licensing, Ltd.

57. On or about August 12, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167735 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

58. On or about August 12, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167736 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

59. On or about August 14, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167838 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

60. On or about August 14, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 167839 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

61. On or about September 3, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 168614 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

62. On or about September 27, 1974, at the direction of Robert J. DeSalvo, American Films puchased cashier's check No. 169664 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

63. On or about September 27, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 169665 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

64. On or about September 30, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 169789 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

65. On or about September 30, 1974, at the direction of Robert J. DeSalvo, American Films purchased cashier's check No. 169790 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $40,000, payable to Caribbean Licensing, Ltd.

66. On or about October 8, 1974, at the direction of Robert J. DeSalvo, Maines & Associates purchased cashier's check No. 170161 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $50,000, payable to Jordan Financial Investments, Inc.

67. On or about October 31, 1974, at the direction of Robert J. DeSalvo, Maines & Associates purchased cashier's check No. 171238 at the American National Bank & Trust Company, Ft. Lauderdale, Florida in the amount of $20,000, payable to Jordan Financial Investments, Inc.

68. On or about October 29, 1973, a check for $50,000, made payable to Haunted House was drawn on the account of AMMA Corporation at the American National Bank & Trust Company, Ft. Lauderdale, Florida.

69. On or about December 20, 1973, check No. 500 for $40,000, made payable to Haunted House was drawn on the account of AMMA Corporation at the American National Bank & Trust Company, Ft. Lauderdale, Florida.

70. On or about December 13, 1973, check No. 147 for $30,000, made payable to Regal Enterprises was drawn on the account of Shore Distributors at First National State Bank Of The Jersey Coast, Spring Lake, New Jersey.

71. On or about January 9, 1974, check No. 601 for $15,000, made payable to Regal Enterprises was drawn on the account of Shore Distributors at First National State Bank Of The Jersey Coast, Spring Lake, New Jersey.

72. On or about January 16, 1974, check No. 148 for $30,000, made payable to Regal Enterprises was drawn on the account of Shore Distributors at First National State Bank Of The Jersey Coast, Spring Lake, New Jersey.

73. On or about May 9, 1974, check No. 187 for $27,000, made payable to Regal Enterprises was drawn on the account of American Films at the Pan American Bank of Broward County, Florida.

74. On or about May 14, 1974, check No. 212 for $20,000, made payable to Regal Enterprises was drawn on the account of American Films at the Pan American Bank of Broward County, Florida.

75. On or about May 14, 1974, check No. 213 for $5,000, made payable to Regal Enterprises was drawn on the account

of American Films at the Pan American Bank of Broward County, Florida.

76. On or about June 1, 1974, check No. 179 for $5,000, made payable to Regal Enterprises was drawn on the account of American Films at the American National Bank & Trust Co., Ft. Lauderdale, Florida.

77. On or about June 18, 1974, check No. 196 for $5,000, made payable to Regal Enterprises was drawn on the account of American Films at the American National Bank & Trust Co., Ft. Lauderdale, Florida.

All in violation of Title 18, United States Code, § 371.

(nm $10,000, or nm 5 yrs., or both)

Appendix

Office-Supreme Court, U.S.
FILED
AUG 11 1981
ALEXANDER L. STEVAS,
CLERK

81-416

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY BATTISTA,
AND
T. ANTHONY ARNONE
Petitioners,

vs.

UNITED STATES OF AMERICA

SUPPLEMENTAL APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioners

NO. _____

IN THE

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SUPPLEMENTAL APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES

COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the Sixth Circuit.

REPORTED OPINIONS DELIVERED IN THE COURTS BELOW

United States v. Battista, et al., 646 F.2d 237(6th Cir., April 6, 1981).

United States v. Joseph Peraino, et al., 645 F.2d 548 (6th Cir., April 24, 1981).

APPENDIX C

Opinion of the Court of Appeals

Nos. 79-5165, 79-5257, 79-5258, 79-5259, 79-5260

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY BATTISTA (79-5165)
T. ANTHONY ARNONE (79-5257)
LOUIS PERAINO (79-5258)
BRYANSTON DISTRIBUTORS, INC. (79-5259)
GERARD DAMIANO FILM PRODUCTIONS, INC. (79-5260),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed April 6, 1981

Before: WEICK, LIVELY and KENNEDY, Circuit Judges.

WEICK, Circuit Judge. Defendants have appealed to this court from the judgment of conviction and sentence entered by the district court upon a verdict of guilty returned by a jury in their second trial on an indictment charging them with conspiracy to violate the obscenity statutes, 18 U. S. C. § 1462 and § 1465 by transporting the obscene film Deep Throat in interstate commerce.[1] Three of the defendants who

[1] Their conviction in the first trial was reversed by this court on the confession of error by the United States Attorney because of an

were tried, Angelo Miragliotta, Anthony Novello, and Mario De Salvo were found not guilty and the charges were dismissed as to them. The defendants found guilty were sentenced as follows: Louis Peraino, 3 years, all but 6 months suspended and a fine of $10,000; Gerard Damiano Film Productions, Inc., fined $10,000; Bryanston Distributors, Inc., fined $10,000; T. Anthony Arnone, 2 years with all but 5 months suspended and a fine of $3,000; Anthony Battista, 2 years with all but 2 months suspended and fined $2,000; Carl R. Carter, imposition of sentence suspended, 5 years probation and fined $1,500; Mell Friedman, 4 months concurrent, 1 year probation and fined $3,000; Michael Cherubino, mistrial declared when jury was unable to agree, charges dismissed.

The appeals were consolidated for oral argument and were submitted to the court on 6 large appendices totaling 3033 pages, 121 transcripts, appellants' briefs raising many issues with subdivisions; the government's brief of 114 pages and lengthy oral arguments. It appears to us that these cases have been given very careful consideration by the district judge and also by the jury. As indicated above, one defendant was given probation and fined $1,500, the sentences of imprisonment ranged from 2 months to 8 months and the fines ranged from $1,500 to $10,000 with most in the lower range.

On appeal, the appellants, jointly or severally, when applicable, have questioned the propriety of the proceedings before the grand jury; the constitutionality of the obscenity statute 18 U. S. C. 1465; the sufficiency of the evidence; the seizure of the film; the admisison or exclusion of evidence; the closing argument of the Assistant United States Attorney; the court's instructions to the jury; the court's failure to discharge the jury prior to the Christmas recess; the sentencing of Louis Peraino.

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erroneous instruction to the jury on including children in community standards, which was held improper by the Supreme Court subsequently in *Pinkus* v. *United States*, 436 U.S. 293 (1978).

As we will point out hereinafter none of these contentions has merit and the convictions will be affirmed.

I

The Grand Jury Proceedings

In the district court, appellants attacked the grand jury proceedings by filing a motion to dismiss the indictment. Prior to the first trial, they made a similar attack which was denied by the court. They contend that the 1974 grand jury which returned the indictment (CR-124) was not properly constituted; that the grand jury did not have probable cause on the issue of obscenity to return the indictment; that the grand jury was not properly instructed on the law of obscenity.

The attack on the 1974 indictment would seem to be irrelevant and misplaced because it was supplanted by a superseding indictment in 1975 being CR-91.

The government strenuously objected to any inquiry into or invasion of the secrecy of the grand jury proceedings. The district court, however, out of an abundance of caution, conducted a lengthy evidentiary hearing. The government called the foreman of the grand jury, Herschel McElroy, who testified. The defendants called two F. B. I. special agents.

A stipulation of facts was approved by all parties and read into the record. The relevant provisions are as follows:

> The grand jury which had been impaneled on January 22, 1973, which was extended to June 25, 1973, heard proof concerning the distribution of Deep Throat. On November 15, 1973, this 1973 grand jury viewed the entire film content of Throat at the Tri-State Theater, Memphis, Tennessee. On December 10, 1973, it heard testimony of approximately eight witnesses concerning the conspiracy involving the film.
>
> In January of 1974 a new grand jury was impaneled. It continued the investigation of Throat and the conspiracy. Between January and the end of June, 1974, on more

than eight occasions, it heard testimony from various witnesses. On May 8, 1974, it also went to view the film. After seeing 15 to 20 minutes of it, they decided they had seen enough and elected not to see the remainder.

On May 1, 1974, all three judges in this district entered an order extending the term of the 1974 grand jury until the *end* of December, 1974. By Court order of July 13, 1974 twelve members of the grand jury were replaced by twelve members that were newly qualified. Eleven of the original members of the 1974 grand jury elected to continue to serve for the second six month period.

During early August of 1974, the 1974 grand jury heard testimony of five witnesses concerning the conspiracy surrounding Throat. [From November 1973 through August of 1974 the grand jury heard testimony of more than sixteen witnesses; a number of witnesses cited above in certain cases were witnesses who were called back.]

On August 15, the 1974 grand jury returned the indictment in the case styled CR 74-124 naming as defendants Anthony Joseph Peraino, Louis Peraino, Robert J. DeSalvo, T. Anthony Arnone, Anthony Battista, Mario DeSalvo, Gerard Damiano Film Productions, Inc. and AMMA Corporation.

In January of 1975 a new grand jury was impaneled. It continued to hear proof concerning the investigation of the conspiracy involving Throat. On June 13, 1975, this grand jury returned a superceding indictment styled CR 75-91 naming as defendants each of the ones previously named in CR 74-124 and adding the following defendants: Herbert Nitke, Michael Cherubino, Joseph Peraino, Carl Carter, Mel Friedman, Herbert Streicher, Bryanston Distributors, Inc., Maines & Associates, Inc., and Plymouth Distributors, Inc.

Each of these three grand juries, 1973, 1974 and 1975, was given instructions regarding the law of the definition

> of obscenity by the Assistant United States Attorney handling the case. These instructions included the *Miller* test of obscenity. There is no recollection by anyone concerning whether or not children were included in the make up of the average person in the community as that phrase is applied to the definition of obscenity.
>
> This stipulation expressly does not waive the United States' vigorous objection to this inquiry into the secrecy of the grand jury proceedings regarding this case and this stipulation is subject to any facts revealed at the hearing.
>
> The 1975 grand jury did not see the movie Deep Throat. (Ap. 2951-57).

The indictment and conviction of Joseph Peraino and Plymouth Distributors is being reviewed separately in Appeal No. 79-5081.

Mr. McElory served as foreman on the 1975 grand jury involved in the investigation of Deep Throat for the entire year. He had seen the movie and testified that two other members of the grand jury had seen it. The indictment was returned in June, 1975. The proof presented to the grand jury as to the sexual content of Deep Throat was the sworn testimony of an FBI Special Agent who read a detailed account of the movie including examples. The examples were oral sex; group sex; cunnilingus; and heterosexual intercourse. They clearly constituted hard core pornography. *United States* v. *Marks*, 520 F. 2d 913 (6th Cir. 1975) *reversed in other grounds* 430 U. S. 188 (1977).

Mr. McElroy on cross-examination further described the testimony of the FBI special agent before the grand jury as follows:

> It seemed to me he went into great detail to set each scene, the characters and exactly what they were doing down to the greatest detail. I was sitting there comparing it to the film I had seen not too many months

> earlier. I could not have sat there myself and written down anything closer to what the film actualy represented. (Ap. 2998).
>
> • • •
>
> I couldn't believe that I was reliving scenes of the film as it went from scene to scene. There were some that asked me, some other jurors, that had not seen the film. They knew I had seen it, and I couldn't think of anything that wasn't included. (Ap. 3000).
>
> • • •

The district court properly denied the motion to dismiss. In our opinion, it was not necessary for the district court to probe into the secrecy of the grand jury proceedings. There is a presumption of regularity which attaches to such proceedings and the defendants have a difficult burden to prove any irregularity. *Cf. United States* v. *Woods*, 544 F. 2d 242, 250 (6th Cir. 1976), *cert. den.*, 429 U.S. 1062 (1977). The defendants proved no irregularity in the present case. The defendants must also demonstrate a particular need that outweighs the secrecy policy. *United States* v. *Proctor & Gamble*, 356 U. S. 677 (1958).

In our opinion, the indictment was valid on its face. Any error on the part of the district court in probing the secrecy of the grand jury proceedings occurred at the insistence of the defendants and was harmful only to the government.

The validity of an indictment is not affected by the type of evidence which is considered by a grand jury even though inadequate or incompetent. *United States* v. *Calandra*, 414 U. S. 338 (1974); *Pittsburgh Plate Glass* v. *United States*, 360 U. S. 395 (1959).

In our opinion, the grand jury was properly instructed on the law of obscenity. During the trial all parties agreed to strike the *Miller* (413 U. S. 15) language from the indictment and to consent for the district court to charge a *Roth-Memoirs* (354 U. S. 476, 383 U. S. 413) standard with the benefits of *Miller*. However, even if an incorrect instruction was given

to the grand jury, which did not occur in the present case, the indictment was valid on its face and was sufficient to require a trial of the indictment on its merits. *Costello* v. *United States*, 350 U. S. 359 (1956); *United States* v. *Slepicoff*, 524 F. 2d 1244 (5th Cir. 1975).

II

Title 18 U.S.C. Section 1465 Is Not Vague Or Overbroad And Is Constitutional

We so held in another case involving a prosecution for transporting Deep Throat in interstate commerce. *United States* v. *Marks*, 520 F. 2d 913 (6th Cir. 1975) (Marks I); See also *Miller* v. *California*, 413 U. S. 123 (1973); *Smith* v. *United States*, 505 F. 2d 824 (6th Cir. 1974); no different rule is required for a multi-state conspiracy. *United States* v. *Sandy*, 605 F. 2d 210 (6th Cir. 1979), *cert. den.*, 444 U. S. 984 (1979).

III

Appellants Arnone and Battista Were Not Denied Due Process of Law. Scienter Was Proven.

The scienter required to support a conviction in the present case is that appellants knew the general nature and character of the film. All of the appellants had such knowledge as was clearly shown by the evidence. It was not necessary that the defendants have personal knowledge of the community standards in each and every place where they distributed the pornographic films. *Hamling* v. *United States*, 418 U. S. 87 (1974); *United States* v. *Sandy*, 605 F. 2d 210 (6th Cir. 1979), *cert. den.*, 444 U. S. 984 (1979).

IV

In our opinion, the district court did not err in denying defendants' motion for judgment notwithstanding the verdict

as Deep Throat is obscene under constitutional standards. A jury issue was presented and in our opinion there was substantial evidence to support the jury's verdict. A majority of the panel have viewed the film. We are unanimously of the opinion that it constituted hard core pornography. *United States* v. *Marks*, 585 F. 2d 164, 171 (6th Cir. 1978).

V

Appellant Arnone challenged the search upon which the film was seized claiming that it was unreasonable and that the affidavit for the search warrant was insufficient.

Arnone owned a 50 percent interest in the stock of the corporation which held title to the film. Former FBI agent Hester testified that he was investigating the film entitled "The Devil In Miss Jones" and interviewed Jim Newman who was carying a large box. Newman was using an alias "Bill Cann" and was leaving a motel in Memphis to return to Florida. Newman declined to advise Hester of the name of his employer or the contents of the box, but was advised that if the box contained an obscene film and he crossed state lines, he would be in violation of federal law. Newman returned to the motel and left the box there when he returned to Florida the next day. Hester obtained a search warrant for the box and after he seized and opened it found that it contained two prints of Deep Throat and did not contain the film "The Devil In Miss Jones."

The district judge ruled reluctantly that Arnone had standing but finding probable cause he upheld the validity of the search warrant, and the seizure of the film on the plain view doctrine. *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971); *United States* v. *Wasserstrom*, 571 F. 2d 351 (6th Cir. 1978).

In our opinion, Arnone lacked standing to object to the search of property owned by a corporation in which he was a shareholder, *United States* v. *Curtis*, 537 F. 2d 1091 (10th Cir. 1976), *cert. den.*, 429 U. S. 962 (1976), and for the addi-

tional reason that the box containing the film had been abandoned by Newman who had custody of it. *United States* v. *Haddad*, 558 F. 2d 968 (9th Cir. 1977). We agree that the search warrant and the seizure were valid.

VI

Was More Than One Conspiracy Alleged In the Indictment And Proven At The Trial?

It is clear that the indictment alleged only one conspiracy namely to transport an obscene film in interstate commerce. The conspiracy did not relate to merely one shipment to a particular place but was national in scope and related to many shipments made to different states. The appellants are seeking to apply a different conspiracy for each shipment.

Whether or not a single or multiple conspiracies were involved is a factual question which the court properly submitted to the jury. The jury verdict obviously is supported by overwhelming evidence and was approved by the district court. *United States* v. *Porter*, 441 F. 2d 1024 (8th Cir. 1971), *cert. den.*, 404 U. S. 830 (1971); *United States* v. *Varelli*, 407 F. 2d 735 (1969).

In *United States* v. *Sandy*, 605 F. 2d 210 (6th Cir. 1979), *cert. den.*, 444 U. S. 984 (1979) we upheld a similar national conspiracy conviction.

VII

The Admissibility Into Evidence Of Statements In Furtherance Of The Conspiracy

This issue was raised by Louis Peraino, Bryanston and Damiano Films and relates to the testimony of Janice DeSalvo, the wife of one of the co-conspirators, Robert DeSalvo, who was convicted in the first trial and the testimony of Barbara Stamp, a general secretary who had a close relationship to Robert DeSalvo.

Before admitting the testimony, in view of objections, the district court conducted a voir dire of each witness in the absence of the jury. The district court excluded certain statements made by Janice DeSalvo as to Louis Peraino, but admitted the remainder of her statements as well as the statements of Barbara Stamp as being in furtherance of the conspiracy. *Campbell* v. *United States*, 415 F. 2d 356 (6th Cir. 1969).

In our opinion, the district court ruled correctly. It should also be noted that there was abundant other evidence linking each of said appellants with the conspiracy, so that any error in the admission of such testimony was not prejudicial.

VIII

The Closing Argument Of The Assistant United States Attorney To The Jury.

Appellants Louis Peraino, Bryanston and Damiano Films contend that this argument was improper and denied them of due process of law.

The second trial had lasted more than five weeks and the first trial lasted nine weeks. Both were bitterly contested. The eleven defendants in the second trial were represented by five attorneys. The government had only one attorney. Each attorney presented his views to the jury vigorously. Timely objections to parts of the closing argument were not made. As to the necessity of timely objections, see *United States* v. *Renfro*, 600 F. 2d 55 (6th Cir. 1979); *United States* v. *Black*, 480 F. 2d 504 (6th Cir. 1973). When timely objections were made, the court gave curative instructions to the jury.

The closing argument of the Assistant United States Attorney to the jury is not to be considered isolated from the arguments of the defendant's five lawyers who were forcefully representing their clients but must be read in connection therewith. When so considered, we are of the opinion that the closing argument was properly responsive to the argu-

:nents of appellant's lawyers and indeed much of it was provoked thereby.

Furthermore, in view of the overwhelming evidence of guilt, we find no prejudicial error.

IX

No Error In The Admission In Evidence Of Certain Proof Or In The Exclusion From Evidence Of Certain Incomparable Materials

Appellants contend that the trial court improperly admitted evidence of an IRS investigation. The trouble with this contention, however, is that the subject was first injected into the case by appellants. This evidence was presented in the form of testimony by an IRS agent and was intended to show that a number of appellants met together at different times. Specifically, IRS Agent Brown testified that he had observed a number of meetings involving appellants Arnone, DeSalvo, Louis Peraino, and others during the course of his investigation. The scope of the evidence was restricted by the court.

Appellants further contend that it was improper to admit evidence that Deep Throat had been seized by law enforcement agents in New Orleans. This proof was offered by the government to show scienter. Appellants argue that the element was not in dispute. It surely was in dispute as it was contended on appeal that the government failed to prove that all of the appellants knew the film was obscene. The admission of proof of other films dealing with sex, the use of fictitious names in shipping the movie, and the destruction of records was admissible to show scienter.

Finally, appellants contend it was improper to admit proof of pandering, i.e. that the movie was a low budget film, produced by persons who had before made low budget sex films, and the movie was advertised to exploit sex. The government contended that this was offered to show that appellants intended the film to appeal to the prurient interests.

As the Supreme Court has indicated, in *Ginzburg* v. *New York*, 383 U. S. 463, 470 (1966):

> Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in determination of obscenity.

See also, Hamling v. *United States*, 418 U. S. 87, 130 (1974).

It is further contended that the district court improperly refused to allow the jury to view slides utilized by defendants' expert in the course of sex education programs in the Memphis area.

Appellants contend the slides should have been admitted, the expert having testified that they were comparable to scenes depicted in Deep Throat. The district court, after having conducted a hearing on the issue, held otherwise. Though the court conceded that part of the activity depicted in the slides was somewhat similar to that depicted in the movie, the court felt that the slides manner of presentation and the audience for whom they were intended were sufficiently different so as to be of no probative value on the issue of community standards. We find no abuse of discretion in the ruling of the district court on the admissibility of this evidence.

X

The Court's Instructions To The Jury

After two long trials, the court was very familiar with the issues involved and spent considerable time with counsel in the careful preparation of its instructions.

In considering these issues, the instructions of the court must be viewed in their entirety and when so considered, we find no prejudicial error.

The appellants raise the following issues:

Whether the instructions to the jury were proper with respect to (a) community standards, (b) withdrawal from

the conspiracy, (c) circumstantial evidence, (d) expert witnesses and the credibility of witnesses, (e) "utterly without redeeming social value", and (f) pandering.

Sub-issue (a): Appellants contend that the court incorrectly refused to instruct the jury that obscenity should be determined by national standards, i.e. what the nation, as opposed to some locality would determine to be obscene. This argument is wholly without merit. *Miller* v. *California*, 413 U. S. 15 (1973); *United States* v. *Sandy*, 605 F. 2d 210, 217-18 (6th Cir. 1979).

Appellants Arnone and Battista challenge the instruction on "community standards" which was as follows: (portions underlined are the parts they find objectionable)

> Contemporary community standards are set by what *is in fact accepted* in the community as a whole, that is to say, by society at large or people in general, and not by what some persons or groups of persons may believe the community as a whole ought to *accept*. Customs change and that the *community as a whole may* from time to time find *acceptable* that which was formerly unacceptable and not infrequently *may find presently acceptable* that which some particular group of the population may regard as unacceptable appeal to prurient interest.

In essence, appellants argue that obscenity does not depend on what the community finds acceptable (that is, what the community approves of) but what the community is willing to tolerate. The argument is, however, misplaced. In *Miller*, the court stated:

> The primary concern with requiring a jury to apply the standard of "the *average* person, applying contemporary standards" is to be certain that . . . *it will be judged by its impact on the average person*.

Miller v. *California*, 413 U. S. at 30 (emphasis added). In short, the concern is indeed on the materials impact upon

the community, as measured by the average member of the community. This point is made even clearer in *Jenkins* v. *Georgia*, 418 U. S. 153 (1974), where the court noted that *Miller* requires triers of fact

> . . . . to decide whether the average person . . . would consider certain materials prurient.

Sub-issue (*b*): Appellants Louis Peraino, Bryanston and Gerard Damiano Film Prod. appear to argue that the instruction on withdrawal from a conspiracy placed the burden of proving withdrawal on the defendant. Appellant Arnone argues that the instruction was incorrect because, after telling the jury that withdrawal requires "definite and decisive steps to disassociate himself fully and completely from the conspiracy," the court gave an example: "For example, a defendant may withdraw by making a clean breast to the authorities or by communicating to his co-conspirators his abandonment . . . by some effective means." Arnone argues that this example might lead the jury to believe that only such dramatic conduct will indicate withdrawal. Considering the instruction in its entirety does not lead to any such conclusion.

We have held that withdrawal is an affirmative defense. *Blue* v. *United States*, 138 F. 2d 351 (6th Cir. 1943). It must be proved by the defendant. *United States* v. *Borelli*, 336 F. 2d 376 (2nd Cir. 1964); *United States* v. *Nowak*, 448 F. 2d 134 (7th Cir. 1971).

We have held that withdrawal requires proof of affirmative action to disavow or defeat the purposes of the conspiracy. *Blue* v. *United States, supra*. The instruction given by the court was in accord with the law of this circuit and was not misleading.

Sub-issue (*c*): Appellants argue that the district court incorrectly refused to instruct the jury that proof by circumstantial evidence of some element of the crime requires the government to disprove "every reasonable theory except the

theory of guilt." Appellants rely on *United States* v. *Leon*, 534 F. 2d 667 (6th Cir. 1976) where this court held that "a verdict of guilty cannot stand on appeal where the evidence at most establishes no more than a choice of reasonable probabilities." In the present cases, the evidence established much more than the mere choices referred to in *Leon*. Furthermore, *Leon* does not require a special instruction on circumstantial evidence. The instruction given by the court was the standard instruction on circumstantial evidence. The Supreme Court has indicated there is no difference between circumstantial and direct proof. *Holland* v. *United States*, 348 U. S. 121 (1954). Also, the convictions in the present case were not based entirely on circumstantial evidence, but on direct evidence as well.

Sub-issue (*d*): Appellants contend that it was improper for the district court to instruct the jury that it need not accept the opinion of an expert. Appellants cite no case which in any way supports this view. Certainly, expert testimony is not required in an obscenity case, and the instruction was the standard one given to make sure the expert does not invade the province of the jury.

Sub-issue (*e*): Appellants contend that the judge's instruction ("if you find beyond a reasonable doubt that the film Deep Throat does not have the slightest redeeming social importance, you may find that the movie is utterly without redeeming social value.") was improper. They do not indicate why this instruction is improper, and we find nothing incorrect in it.

XI

The Trial Court Did Not Abuse Its Discretion In Denying A Mistrial Prior To The Christmas Recess.

Appellants complain about the court's denial of their motion to declare a mistrial when the jury was deadlocked in their case and in the case of one other defendant just prior to the

Christmas holiday recess and the court had given a modified *Allen* charge to the jury.

The jury had previously on December 22, 1978, returned verdicts of not guilty as to defendants Miragliotta and Novello and guilty verdicts as to appellants Gerard Damiano Productions, Louis Peraino, Bryanston Distributors, Inc., T. Anthony Arnone and Anthony Battista.

At the time the motion for a mistrial was being argued to the court on December 22, 1978, the jury returned a verdict of not guilty in favor of Mario DeSalvo. The jury after the Christmas holidays was unable to agree on a verdict in the case against Michael Cherubino and a mistrial was declared and the indictment against him later was dismissed.

In discussing this topic, complaint is made about pretrial publicity including newspaper articles quoting the prior United States Attorney and his Assistant, television cameras located at one time outside of the courtroom about 18 feet distant therefrom and later removed from the floor on which the courtroom was located, prior to taking of testimony in the case.

As to pretrial newspaper publicity there is no question but that the trial generated publicity although it appeared that more publicity was generated at the first trial than at the second trial. Most of the publicity was reporting by newsmen directed at the film Deep Throat rather than at the defendants. It was not hostile or prejudicial to the defendants. Prior to the second trial, the court determined after a hearing that the indictment should not be dismised nor should the case be transferred. It would be difficult to find a place in Tennessee for transfer of the case where newspaper or television publicity had not permeated.

It is clear that there was no showing of any prejudice on the part of the jury trying the case. Jury selection was carefully handled by the court and counsel. It took a long time. Each juror was questioned individualy on pretrial publicity. All of the defendants were satisfied with the jury.

The performance by the jury was excellent. There was no claim made of jury misconduct. The jury acquitted some of the defendants and convicted others. They gave careful consideration to the issues of the case. There was no proof of juror prejudice against any of the defendants.

We find no prejudice to the defendants occasioned by the television cameras located originally 18 feet from the courtroom door and then later removed from the floor on which the courtroom was located. At the time that the cameras were removed from the entire floor, the first witness in the case had not been called.

It was within the sound discretion of the district court whether to declare a mistrial. In our opinion, that discretion was not abused.

XII

We find no error in the moderate sentence of Louis Peraino to a term of three years, to serve only six months with the execution of the balance suspended and placed on probation for the balance of the sentence and a fine in the amount of $10,000. A previous sentence which was illegal under 18 U. S. C. § 3651 was set aside and he was given a correct sentence permitted by the statute.

We are also of the opinion that the conditions of probation as to defendants were permitted as a matter of grace, since it relates to the protection of the public and to the rehabilitation of the defendants .

The judgments of conviction and sentences are hereby affirmed.

APPENDIX D
Opinion of the Court of Appeals
(companion case)
No. 79-5081

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOSEPH PERAINO and PLYMOUTH DISTRIBUTORS, INC., *Defendants-Appellants.*	APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed April 6, 1981

Before: WEICK, LIVELY and KENNEDY, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court in which KENNEDY, Circuit Judge, joined. WEICK, Circuit Judge, (pp. 12-13) filed a separate dissenting opinion.

LIVELY, Circuit Judge. The appellants, along with nine other defendants, were indicted and tried by a jury at Memphis in the Western District of Tennessee for conspiracy to violate federal obscenity statutes, 18 U.S.C. § 1462 and § 1465, by transporting the film "Deep Throat" in interstate commerce. At a joint trial the defendant Joseph Peraino was found guilty, sentenced to 18 months with all but 6 months suspended and fined $10,000; Plymouth Distributors, Inc. was fined $8,000. Five other defendants were found guilty, three were acquitted by the jury and the charges against one were dismissed when the jury was unable to agree as to him.

The appeals of the seven defendants convicted by the jury

were consolidated and oral arguments were heard from all counsel. In a decision filed today the court unanimously affirmed the convictions of all but Joseph Peraino and Plymouth Distributors, Inc. *United States* v. *Battista, et al.*, — F.2d — (1981). Joseph Peraino (hereinafter Peraino) and Plymouth Distributors, Inc. (hereinafter Plymouth) raised an issue common only to themselves, and the panel determined that a separate opinion is required to deal with this issue.

The film was shown in Memphis in February 1974 and the first indictment was returned there on August 15, 1974. Peraino and Plymouth were not named in the indictment. However, in a superseding indictment returned on June 13, 1975, these defendants were named, along with others, as members of a conspiracy to violate 18 U.S.C. § 1462 (transportation of obscene matter) and 18 U.S.C. § 1465 (transportation of obscene matter for distribution). The indictment alleged overt acts in Memphis only in connection with the film being shown there, none later than March 1974, and later overt acts elsewhere as part of a national conspiracy to transport "Deep Throat" interstate up to the time of the indictment.

There was no evidence linking Peraino and Plymouth with any of the co-conspirators or with the film itself until at least eight months after the Memphis showing. In October 1974 Peraino was seen in Florida with some of the co-conspirators. In November 1974 he received three $275 checks, not shown to be connected with "Deep Throat," from the New Jersey office of the film distributor which handled other films as well as "Deep Throat." The evidence showed that Peraino took over the distribution of the film in December 1974 and moved the distribution center from Florida to New Jersey. He formed Plymouth for the purpose of distributing the film in Pennsylvania, Connecticut, New Jersey and Maine. There was evidence he did not intend to distribute the film in communities where it would offend or cause legal problems. So far as the evidence shows, Peraino and Plymouth had no relationship with the prior distributors of the film other than

that in December 1974 they employed two unindicted co-conspirators who had been engaged in the earlier Memphis showing and retained a lawyer who had been involved in production of the film. There was no evidence that the film was ever transported to or through the Western District of Tennessee or that any overt acts took place there after Peraino and Plymouth took over distribution. There was no evidence that the community standards of any community to which they did transport the movie were violated.

Peraino and Plymouth assert that they were denied First Amendment and due process rights by being required to stand trial in the Western District of Tennessee. They contend that there is no venue "where, during the course of a particular defendant's actual participation in the alleged conspiracy, it was not an objective of the conspiracy to distribute the allegedly obscene material within the Federal district." They argue that "expression" may be suppressed as obscene only in those places where it is found so under local community standards. Since these standards vary from place to place, due process is violated by enforcing a venue provision which has the effect of basing conspiracy convictions under §§ 1462 and 1465 on the standards of a community with which the defendant has had no contact. The government responds that under settled conspiracy law each person who joins is held responsible for prior acts of all conspirators in furtherance of the purpose of the conspiracy and that venue is properly laid in the district of any overt act.

Though Congress apparently recognized that obscenity posed a national problem in enacting 18 U.S.C. §§ 1461-1465, the Supreme Court has held that there is no national standard by which material can be judged to determine whether it is obscene. *Miller* v. *California*, 413 U.S. 15, 30-33 (1973). "To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *Id.* at 30 (emphasis in original). Instead, even in federal prosecutions for transporting allegedly obscene ma-

terials in interstate commerce, the material must be tested by "contemporary community standards." *Hamling* v. *United States*, 418 U.S. 87, 104-07 (1974). As a practical matter this becomes the standard of the "community" from which the jury is drawn.

> [T]he prosecution need not as a matter of constitutional law produce "expert" witnesses to testify as to the obscenity of the materials . . . . A juror is entitled to draw on his *own* knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination . . . .

Id. at 104 (emphasis added).

> Since this case was tried in the Southern District of California, and presumably jurors from throughout that district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.

Id. at 105-106. As Justice Brennan explained, "It may be that the Court's unarticulated assumption is that jurors instructed to apply 'national' standards will inevitably apply the standards of their local community, because national standards are simply 'unascertainable.'" *Id.* at 151 n.5 (dissenting opinion). That community standards will vary throughout the nation may be said to serve the principles of the First Amendment.

> The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes, a point which Mr. Justice Harlan often emphasized.

Miller, supra, 413 U.S. at 32 n.13. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33.

Venue for federal obscenity prosecutions lies "in any district from, through, or into which" the allegedly obscene material moves, according to 18 U.S.C. § 3237. This may result in prosecutions of persons in a community to which they have sent material which is obscene under that community's standards though the community from which it is sent would tolerate the same material. *See United States* v. *Blucher,* 581 F.2d 244 (10th Cir. 1978), *vacated,* 439 U.S. 1061 (1979).

When this liberal venue rule is applied in a prosecution for conspiracy to violate the federal obscenity laws, as in the present case, a constitutional issue is presented. The material is entitled to First Amendment protection except where it violates community standards. Here, in addition to distributing "Deep Throat" in Memphis, where it was illegal, the conspirators were engaged in its distribution in other communities where it was not shown to be illegal, and therefore is presumed to be legal. Venue in an obscenity conspiracy case must be based on the allegedly obscene material once being present in the district, 18 U.S.C. § 3237, and either on the conspiracy being formed there or on an overt act taking place there, *see Brown* v. *Elliott,* 225 U.S. 392, 400 (1912). A person who enters into an agreement to distribute the material after the venue-setting act is not constitutionally subject to prosecution in the district of venue in the absence of some subsequent act or agreement related to the district of venue or another district in which the material is found to be obscene. One who has no connection with the district of venue at the time of the venue-setting act may not be convicted there for subsequently transporting the materials into other communities whose standards were not established. Merely joining the conspirators in their lawful distribution efforts in other communities after the film was no longer being

shown in Memphis does not evidence intent to further or advance the illegal purpose of the conspiracy to ship the film into Memphis. Absent any evidence of adherence to the criminal purposes of the conspiracy, defendants Joseph Peraino and Plymouth Distributors cannot be held to have become members of the conspiracy. *See United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443 n. 20 (1978) (intent to effectuate the object of a conspiracy is a necessary element of membership in the conspiracy); LaFave & Scott, *Criminal Law*, 470 (1972).[1] Yet, that is exactly what happened in the present case.

The general rule that one who joins a conspiracy at any time before it ends may be held responsible for acts and agreements which took place before he joined, *e.g.*, *United States* v. *Cimini*, 427 F.2d 129, 139 (6th Cir.), *cert. denied*, 400 U.S. 911 (1970), does not control when First Amendment rights are at stake. In most cases the illegal purposes of a federal conspiracy will be illegal in every federal jurisdiction. However, when the agreement alleged is one to distribute materials which constitute expression, the agreement may have both legal and illegal purposes depending on varying community standards.[2] Where one joins an ongoing undertaking to distribute expressive materials interstate he should not be convicted solely on the basis of agreements and overt acts which

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[1] It is unusual to have conduct which is legal in one state and illegal in another. However, application of the community standards test leads to that result in the case of obscenity. The Supreme Court has recognized that material may be proscribed in one community but not in another, and that the courts must recognize the rights of the diverse communities. *Miller*, *supra*, 413 U.S. at 32-33.

[2] This is not to say that the government must prove that the conspirators had actual knowledge that the film was obscene. The scienter sufficient to support a conviction is that they knew the general "character and nature" of the film. *Hamling*, *supra*, 418 U.S. at 123. We do hold that to convict one as a conspirator it is necessary to prove that a purpose of the conspiracy, at the time the conspirator was a member, involved a community, the standards of which were violated by the film.

pre-dated his joining.[3] In order to avoid violation of such person's First Amendment rights, the government is required to prove either that he agreed to distribution of material to communities where it would be found obscene or permitted such future distribution to occur and failed to withdraw from the conspiracy.

The government relies primarily upon *Hamling* v. *United States, supra,* and *United States* v. *Sandy,* 605 F.2d 210 (6th Cir.), *cert. denied,* 444 U.S. 984 (1979), in arguing that Peraino and Plymouth could be tried and convicted under the Memphis community standards for agreements and acts which long pre-dated their involvement with "Deep Throat." Both cases are distinguishable. In neither case did any of the conspirators join the conspiracy after the acts occurred upon which venue was based. In *Hamling* conspiracy and venue questions were not at issue. In *Sandy,* this court held that the district court was not required to apply a multitude of local standards, depending on the distribution area which each distributor served. It stated:

> Having voluntarily chosen to enter a conspiracy of national scope, appellants limited their right to be tried according to the standards of the localities in which their operations are centered.

Id. at 218. The quoted language does not answer the question raised in the present case because all of the conspirators in *Sandy* were members at the time of the mailing of material into a community where it was obscene by local standards. What *Sandy* establishes is that a member of a con-

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[3] Even under general conspiracy law where a conspirator is held responsible for acts of the conspiracy before he joined, it is still necessary to show an overt act of one of the conspirators "thereafter." *United States* v. *Thompson,* 533 F.2d 1006, 1009 (6th Cir.), *cert. denied,* 429 U.S. 939 (1976). In the present case, although overt acts were alleged after Peraino and Plymouth began distribution, none was shown to violate the standards of a community in which it took place.

spiracy may be tried and convicted under the community standards of a jurisdiction to which obscene materials are sent while he is a member of the conspiracy, though an individual conspirator need not have been personally involved in any of the venue-setting acts. This is so because every conspirator is liable for acts of other conspirators designed to further the purpose of conspiracy. In *Sandy* that purpose included distribution at the place of trial after each conspirator had joined. The only respect in which Peraino and Plymouth may be considered part of the ongoing conspiracy is that they continued the interstate distribution of "Deep Throat" after December 1974. However, there was no evidence that they agreed with anyone to distribute it to communities under whose standards it would be obscene. In fact, the only evidence is just the contrary.

The present case clearly is not controlled by *Sandy*. That case involved a "wheel" type conspiracy. The district court in *Sandy* found that individual conspirators who were subdistributors of a film ("spokes" of the wheel) owned by another distributor (the "hub" of the wheel) had agreed among themselves that they would forward the film to other communities if requested rather than return it to the "hub" after showing it. This agreement provided the "rim" of the wheel and tied all the conspirators together in a common enterprise. 605 F.2d at 216. This court held:

> Once the conspiracy *to which they belonged* was shown to have extended to and operated in Memphis, the defendants had no right to have the obscenity of the film tried according to the community standards of other localities . . . .

Id. at 217 (emphasis added). Again, there was no issue in *Sandy* of the liability of one who joined the conspiracy after the last overt act in Memphis occurred. Insofar as Peraino and Plymouth are concerned, they were part of a "chain" rather than a "wheel" conspiracy. *Sandy* affirmed that each con-

spirator need not have personal contact with the *place* involved in the indictment. It did not concern the question of membership in the conspiracy at the *time* of the venue-setting act.

Though the reasons for its summary reverasl are not clear, the Supreme Court's action in *Blucher* v. *United States, supra,* does raise a question which is pertinent to this case. In *Blucher* an Oregon postmaster requested a Wyoming postmaster to solicit materials by mail, under a false name, from an Oregon resident. There was no apparent reason for this strategem except the possibility that a Wyoming venire would apply a more restrictive community standard than one drawn from the Oregon district. The defendant was indicted under § 1461 and tried in Wyoming. His only contact with Wyoming consisted of mailing the materials to that state. Blucher was convicted and the Tenth Circuit, on the basis of *Hamling, supra,* affirmed with obvious misgivings. 581 F.2d 244 (1978). The Supreme Court vacated the judgment and remanded with directions that the indictment be dismissed. 439 U.S. 1061 (1979). Since similar government conduct – solicitation of materials by a postal inspector using a false name – had been approved by the Court in *Smith* v. *United States,* 431 U.S. 291 (1977), it may be presumed that the government's blatant forum shopping, not present in *Smith* or *Hamling,* was the reason for reversing *Blucher.* If so, the present case is much stronger for reversal. The defendant in *Blucher* did mail into Wyoming matter which a jury there found to offend community standards. Peraino and Plymouth Distributors had nothing to do with "Deep Throat's" Memphis presence.

The government offered no proof of the community standards to which Peraino and Plymouth caused "Deep Throat" to be sent. The court's instructions allowed the jury to apply standards of the jury's own community. Thus we do not reach the question of whether venue in the Western District of Tennessee could have been upheld by submitting to a jury of

that district the issue of whether "Deep Throat" offended the standards of any other community – without regard to the standards of the trial district – to which these defendants agreed to transport the film.[4] There is serious doubt, however, that a jury of one district could properly determine the standards of another community solely on the basis of expert testimony. *See Hamling, supra,* 418 U.S. at 151 n. 5 (dissenting opinion); *United States* v. *Elkins,* 396 F.Supp. 314, 316, 318 (C.D. Cal. 1975); *United States* v. *Mohney,* 476 F.Supp. 421 (D. Hawaii 1979). In *Mohney* the court stated:

> Inherent in *Miller* and *Hamling* is the idea that jurors are drawing on personal knowledge of their own community. While expert opinions may be relevant, jurors are completely free to disregard all expert testimony. If jurors cannot draw on personal knowledge, the idea of local community standards is a *totally* useless concept. A jury from the District of Hawaii cannot determine the community standards of the Eastern District of Michigan.

Id. at 426-27 (emphasis in original). This language points out the inherent difficulty of attempting to prosecute national conspiracies under the federal obscenity statutes in a single district.

One statement in the dissent requires a reply. The dissent states that "the stipulation entered into by all the parties clearly established venue in the Western District of Tennessee." The stipulation was not so broad. As quoted in the opinion of the court in the companion cases (*United States* v. *Battista, et al.*, decided this date) the stipulation merely related to activities of the three grand juries of the Western District of Tennessee which investigated the showing of "Deep

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[4] We recognize that the district court might "be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide." *Hamling, supra,* 418 U.S. at 106.

Throat" in Memphis. This investigation resulted in the indictments in this and the companion cases. It is clear that the appellants Peraino and Plymouth vigorously challenged venue throughout the district court proceedings. This is shown by a pretrial motion (appendix, p. 160) with supporting memorandum (appendix, p. 173) and a similar post-trial motion (appendix, p. 282). Further, in its instructions the district court advised the jury of the position of these appellants on this issue (appendix, p. 2700).

The convictions of Joseph Peraino and Plymouth Distributors, Inc. are reversed with directions to dismiss the indictments against them.

WEICK, Circuit Judge, dissenting:

I respectfully dissent.

Joseph Peraino and Plymouth Distributors, Inc. contend principally that the district court did not have venue jurisdiction over them since they had joined the conspiracy some eight months after the obscene film Deep Throat had been shown in Memphis. They argue that if each district where the film previously had been distributed had jurisdiction that this would subject them to varying community standards the details of which they had no wledge and in violation of their constitutional rights. They offered no proof, however, of different community standards except self-serving statements and opinions from their own past employees. Here the conspiracy in which these defendants joined was of national scope even though they later restricted the territory in which they operated. *Hamling* v. *United States*, 418 U. S. 87 (1974); *United States* v. *Sandy*, 605 F. 2d 210 (6th Cir. 1979), *cert. den.*, 444 U. S. 984 (1979). These defendants never withdrew from the conspiracy.

Their contentions conflict with the fundamental law of conspiracy. A conspirator need not join a conspiracy at its inception, in order to become liable as a conspirator. When he joins the conspiracy, he is bound by the prior acts and statements of other conspirators made in furtherance of the common objective which, in this case, was the distribution of an obscene movie Deep Throat in interstate commerce. *United States* v. *Cimini*, 427 F. 2d 129 (6th Cir. 1970), *cert. den.*, 400 U. S. 911, *reh. den.*, 400 U. S. 984 (1971). These defendants as the jury found had full knowledge of the details of the obscene film and of community standards. The government, however, was not required to prove that each conspirator was familiar with each and every detail of the conspiracy. *United States* v. *Mishkin*, 317 F. 2d 634 (2nd Cir. 1963), *cert. den.*, 375 U. S. 827 (1963). From the time that the agreement is entered into, the crime of conspiracy is

a continuing crime from its inception to its conclusion. Prosecutions for conspiracy may be made either where the conspiracy was formed or where any overt act in furtherance of the conspiracy was committed. *United States* v. *Downing*, 51 F. 2d 1030 (2nd Cir. 1931). Even an overt act not pleaded in the indictment may be used. *Brown* v. *Elliot*, 225 U. S. 392 (1912); *United States* v. *Downing*, 51 F. 2d 1030 (2nd Cir. 1931). Only slight evidence is necessary to connect a defendant with a conspiracy. *United States* v. *Chambers*, 382 F. 2d 910 (6th Cir. 1967).

The stipulation entered into by all of the parties clearly established venue in the Western District of Tennessee. These defendants are bound by their stipulation.

Joseph Peraino was no novice. As the majority concedes, Peraino took over the distribution of the film in December 1974 and moved the distribution center from Florida to New Jersey. He organized Plymouth Distributors, Inc. for the purpose of distributing the film in Pennsylvania, Connecticut, New Jersey and Maine. The jury was fully justified in finding these defendants knowledgeable in every particular. I find no basis for carving out an exception to the well established rule of conspiracy which would exempt these defendants from the consequences of their knowledgeable acts. I would affirm these convictions.